Supreme Court, U.S.
FILED

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No. 10-

IN THE

Supreme Court of the United States

CHAYA AND MICHAEL UNGAR, YITTY NIEMAN, FRIEDRICH AND REGINA WEISER, MOSHE DEUTSCH, ISAAC TELLER, SOLOMON WOLLNER, SHIA PINCHUS SCHWARTZ, IRENE ACKERMAN, YEHUDA STEIN, SOLOMON WERZBERGER, JOSHUA ADLER, CHAIM EIDLISZ, AZRIEL KATZ, MOSHE STERN, ESTHER SCHWARTZ,

Petitioners,

v.

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an effort to remediate past racial discrimination, the New York City Housing Authority ("NYCHA") adopted certain policies including a Tenant Selection and Assignment Plan ("TSAP"). While the TSAP generally precludes an eligible applicant from choosing a particular housing project, it creates exceptions to this general rule for certain secular reasons (e.g., for domestic violence victims, for those in need of health and/or child care). The TSAP does not allow exceptions for families who, because of religious needs, must be in a particular project, and, if such families refuse available housing in projects where their religious needs cannot be met, they are dropped from the list of eligible applicants. The question presented is:

1. Where a public housing authority has adopted a general rule for providing benefits that limits a qualifying applicant's ability to choose the location of the housing, but makes exceptions to this general rule for certain secular needs, whether, in the absence of a compelling state interest, the Constitution permits the authority to ignore religious needs and force members of a faith to forego following precepts of their religion in order to receive public housing benefits?

PARTIES TO THE PROCEEDING

Petitioners are Chaya And Michael Ungar, Yitty Nieman, Friedrich And Regina Weiser, Moshe Deutsch, Isaac Teller, Solomon Wollner, Shia Pinchus Schwartz, Irene Ackerman, Yehuda Stein, Solomon Werzberger, Joshua Adler, Chaim Eidlisz, Azriel Katz, Moshe Stern, Esther Schwartz, plaintiffs-appellants below.

Respondent is the New York City Housing Authority, defendant-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Chaya and Michael Ungar, Yitty Nieman, Friedrich and Regina Weiser, Moshe Deutsch, Isaac Teller, Solomon Wollner, Shia Pinchus Schwartz, Irene Ackerman, Yehuda Stein, Solomon Werzberger, Joshua Adler, Chaim Eidlisz, Azriel Katz, Moshe Stern, Esther Schwartz, respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's summary order is unpublished, but available electronically at 2010 U.S. Dist. LEXIS 1666 (2d Cir. N.Y. Jan. 26, 2010) and reprinted in the Appendix to this Petition ("App.") at 1a-5a. The district court's decision granting respondent's motion for summary judgment is unpublished, but available electronically at 2009 U.S. Dist. LEXIS 3578 (S.D.N.Y. Jan. 14, 2009) and reprinted at App. 8a.

JURISDICTION

The court of appeals issued its decision on January 26, 2010, App. 1a, and denied petitioners' timely petition for rehearing en banc on March 26, 2010, App. 6a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

First Amendment Of The Constitution Of The United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment of the Constitution Of The United States

... No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, all Hasidic Jews residing in the Williamsburg section of Brooklyn, New York, brought religious discrimination and Free Exercise claims against the New York City Housing Authority ("NYCHA"). Petitioners claimed that, in an effort to remediate past *racial* discrimination by NYCHA, NYCHA and its agents adopted a rule -- the Tenant Selection and Assignment Plan (hereinafter "TSAP") -- that effectively denies Hasidic families public housing opportunities that are available to other who have secular needs.

TSAP creates a general rule providing housing benefits. There is one procedure for new applicants for public housing, and another procedure for

current tenants seeking to transfer from one public housing apartment or project to another. New applicants may select a NYC borough in which they wish to live (e.g., Brooklyn), but cannot request a particular *project* within a borough (e.g., Williamsburg). Applicants are placed on a waiting list; some are assigned a priority based on income and/or need. Once an applicant comes to the top of the list, he or she may select a unit from a list of apartments designated as available in the borough selected on the application. If the applicant fails or refuses to choose from the list, the application is deemed "dead" and the applicant may not reapply for housing for one year. Upon reapplication, the applicant is essentially at the bottom of the waiting list. (There are certain exceptions: for example, "emergency applicants" and "applicants for five bedrooms or more" may select only the borough in which they wish to live, and not a particular project. However, these applicants may reject one offer without penalty, and maintain their position on the list until offered the next appropriate vacancy; if two offers are rejected, the application is deemed "dead.")

Existing tenants may apply for a transfer to another apartment or project. Significantly, the TSAP awards transfer priorities for certain "good causes" (such as tenants whose apartment have become uninhabitable, tenants who are victims of domestic violence, tenants in "underoccupied" apartments (e.g., one person living in a two-bedroom apartment)). Some categories of transferees (such as those living in underoccupied apartments) may choose *any* project whether or not it is designated as anticipating vacancies; other categories (such as

"related to a family member who dies in the apartment at which such tenant resides") "may choose to transfer within their current project"; others (such as "extremely overcrowded" and "involved in long-term friction between neighbors") "must choose their current project" unless certain specific conditions exist; *and most importantly, others (such as transferees who show that a relative will provide health or child care) are assigned to the project where (or near to where) that relative lives whether or not that project is designated as anticipating vacancies.*

Though those health and child care exceptions exist, there is no exception for people who, for religious reasons, must live in a certain project close to religious facilities. Thus, Petitioners claimed (and it was not disputed) that NYCHA was aware that, for religious reasons, Hasidic families residing in Williamsburg, Brooklyn, cannot accept public housing units far from the synagogues, yeshivas, and kosher markets in that community. Accordingly, under TSAP, Hasidic applicants (typically with large families) are dropped from a waiting list if an apartment in Williamsburg is not on the list of available apartments when the applicant reaches the top of the list (whether as a new applicant, or as a transferee seeking a five-or-more-bedroom apartment).

Petitioners alleged that NYCHA's "rule" (the TSAP) burdens the free exercise of their religious convictions – and that since the TSAP and NYCHA provide for *exceptions* to the rule, it must recognize Petitioners' religious needs, and at least allow

applicants with these religious needs to remain on the waiting list instead of "killing" the application if a suitable apartment in the Williamsburg buildings is not available when Petitioners (and those similarly situated) made it to the top of the list. Petitioners claimed that, where TSAP accommodated certain applicants (such as those needing child care or home health care) by allowing them to select particular public housing units where their needs could be met, NYCHA's refusal to allow a similar accommodation for Orthodox Jewish applicants who have religious reasons for needing to specify a development devalues those religious needs and constitutes a violation of the First and Fourteenth Amendments.

The Second Circuit's Summary Order

As to the Free Exercise Claim, the Circuit did not find it significant that there were *secular* but not *religious* exceptions to TSAP's general rule precluding an applicant from choosing a particular project. Indeed, it seemingly reasoned that the secular exceptions were not "exceptions" at all; rather, it viewed the exceptions themselves as "rules of general applicability" because they are available to Hasidic Jews and non-Hasidic Jews alike. Having done away with the exceptions, the Court concluded that TSAP as a whole was "neutral and generally applicable" and could be upheld so long as there was a "rational basis" for the plan.

Thus, the Circuit applied the "rational basis" analysis used where a facially neutral regulation either criminalizes religious activity or compels

conduct some find objectionable for religious reasons. It held that TSAP is "neutral" and "generally applicable" in its operation and, therefore, need not be justified by any compelling interest notwithstanding its "incidental effect of burdening" petitioners' religious practices. According to the Circuit, even though there were secular "exceptions" to TSAP's "general" rules, the TSAP was still a regulation of "general applicability" because these exceptions are for "specified categories," are not made on an "ad hoc" basis, and are available to Hasidic Jews if they fall into one of the categories. The Circuit deemed the stated reason for the exceptions "rational" and concluded, therefore, that petitioners had not established a "Free Exercise" violation.

REASON FOR GRANTING THE PETITION

THE SECOND CIRCUIT DECIDED AN IMPORTANT FREE EXERCISE CLAIM IN A WAY THAT CONFLICTS WITH A LINE OF RELEVANT DECISIONS OF THIS COURT: *SHERBERT V. VENEER*, 374 U.S. 398 (1963); *THOMAS* V. *REVIEW BOARD OF INDIANA EMPLOYMENT SECURITY DIV.*, 450 U.S. 707 (1981); AND *HOBBIE V. UNEMPLOYMENT APPEALS COM.*, 480 U.S. 136 (1987).

Under These Precedents, A State May Not Force Members Of A Faith To Forego Following The Precepts Of Their Religion In Order To Receive The Benefits Of Public Welfare Legislation In The Absence Of A Compelling State Interest.

Free Exercise cases decided by this Court can be divided into at least two strands. The Second Circuit confused the two, and mistakenly applied the analysis used in one strand to a case falling in the other. Its erroneous decision has a profound impact on the lives of petitioners and others similarly situated. Certiorari should be granted to set the standards clear and prevent potentially devastating harm to religious individuals.

The Second Circuit drew from a strand of cases involving government action or legislation that either proscribes or prescribes certain conduct. The basis for the Free Exercise claim made in those cases

is that the government either had criminalized activity that for some was religiously inspired, or compelled conduct that some found objectionable for religious reasons. The conduct criminalized in such cases (such as peyote use) generally poses a threat to public safety, peace, or order.

This strand is exemplified by *Employment Division, Dep't. of Human Resources v. Smith*, 494 U.S. 872, 879 (1990), where this Court wrote, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Id. at 879. Such laws need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Rather, as a matter of constitutional law, such legislation or regulation must have a rational basis to withstand a Free Exercise challenge.

The other strand of cases -- and the one overlooked by the Second Circuit -- involves access to government benefits. The First Amendment challenge in these cases is to a government regulation that indirectly and incidentally forces an individual to choose between securing a governmental benefit and adhering to a religious belief. (In these cases, there is no apparent threat to the public safety from the religious practice at issue.) Where the State conditions receipt of an important benefit on the forfeiture of an important religious

rite, this Court has held that such government action is subject to strict scrutiny and can be justified only by proof by the State of a compelling interest.

The instant case – in which petitioners were dropped from the waiting list and effectively denied public housing because they refused to live far from Williamsburg and forfeit their ability to practice their religion -- fits within this strand. However, the Circuit erroneously subjected the Housing Authority's waiting list policies to a rational basis test rather than to strict scrutiny.

The strict scrutiny test is found in a trio of unemployment compensation cases decided by this Court: *Sherbert v. Veneer*, 374 U.S. 398 (1963); *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U.S. 707 (1981); and *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136 (1987). In each case, the Court applied strict scrutiny analysis to a State's decision to deny unemployment benefits to an employee forced to leave a job because of his or her religious convictions. In each, the Court found that the State's action was not justified by a compelling interest and therefore violated the Free Exercise Clause of the First Amendment. The same principles ought to apply in the context of public housing benefits.

In *Sherbert*, for example, the Court considered South Carolina's denial of unemployment compensation benefits to a Sabbatarian who refused to work on Saturdays. The Court held that the State's disqualification of Sherbert

> [forced] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.

374 U.S., at 404. The Court concluded that the State had imposed a burden upon Sherbert's free exercise rights that had not been justified by a compelling state interest.

Likewise, in *Thomas*, the Court found that an employee had been "put to a choice between fidelity to religious belief or cessation of work" and held that a State's denial of unemployment benefits unlawfully burdened the employee's right to free exercise of religion. It said:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, *or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S., at 717-718 (emphasis added). As in *Sherbert*, the *Thomas* Court held that such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest.

The Court reiterated this in *Hobbie*, another case involving denial of unemployment benefits to an employee who had been discharged because of her Sabbath observance. Importantly, in doing so, the Court rejected Florida's contention that its justification for denying benefits should be assessed under "the less rigorous standard articulated in Chief Justice Burger's opinion in *Bowen* v. *Roy*, 476 U.S. 693, 707-708 (1986): `[The] Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.'" *Hobbie*, 480 U.S. at 148.

The reasons why the *Hobbie* Court rejected the state's plea for a less rigorous standard are important, and many have particular resonance in the instant case.

First, the Court pointed out that the lower standard advocated by Justice Burger in *Bowen v. Roy* failed to garner a majority of the Court. Five justices rejected it because, as Justice Connor opined, it had no basis in precedent and diminished the First Amendment free exercise right.

Moreover, the Court noted that even Justice Burger had expressly reaffirmed the holdings of

Sherbert and *Thomas* because he recognized that the various unemployment compensation schemes at issue in those cases had a "good cause component" which provided a mechanism for individualized exemptions. Justice Burger recognized that, if a state creates such a mechanism, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. . . . [T]o consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion. . . . In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." 476 U.S., at 708 (citations omitted).'" *Hobbie*, 480 U.S. at 142, n.7.

The TSAP scheme at issue here provides a mechanism for individual exemptions to the borough-but-not-project-selection/ drop-from-the-waiting-list policies based on individualized assessments of need (e.g., the need for child care, the need for health care), but does not make an exception for religious needs. The system thus exhibits hostility, not neutrality, towards religion, and, therefore, the State should have been required to demonstrate a compelling reason – not just a "reasonable basis" -- for its policies.

Indeed, in this case, petitioners claimed that the housing authority was aware that the religious needs of the Hasidic community would force them to forego public housing options away from Williamsburg and the system was specifically designed to take advantage of this situation. This intentional discrimination cannot be justified on the

simple ground that dropping those who refuse offered housing from the waiting list is administratively expedient.

The Circuit should have recognized that TSAP itself is the "rule" that provides the public benefit, and as the "rule" for which specific *secular* "exemptions" are recognized. It should not have treated each exemption as itself the "neutral rule". They are the *exceptions*. If the decision is allowed to stand, it will swallow up the Constitutional requirement recognized in the cases of this Court, that where a public benefit is provided, and there are secular *exceptions*, religious "exceptions" must also be recognized.

The Circuit should, therefore, have required respondent to provide a compelling reason for the NYCHA's refusal to provide exemptions when Orthodox Jewish applicants need housing in a particular development. Since no compelling reason was offered – solely the tepid response that it needs applicants to fill vacancies – this Court should hold that petitioners' Free Exercise rights are violated by NYCHA's refusal to recognize their religious needs. (At the very least, the question whether there is a compelling reason should be an issue for a jury, not decided by the Court on a motion for summary judgment.) [1]

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[1] Even if "rational basis" analysis applied, the Circuit ignored evidence of *intentional* discrimination in answering the threshold question whether TSAP is actually "neutral" and "generally applicable." As the Tenth Circuit recognized in

In *Sherbert*, *Thomas*, and *Hobbie*, the employees were forced to choose between fidelity to religious belief and continued employment; "the forfeiture of unemployment benefits for choosing the

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Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) ("*Axson*"), "A rule that is discriminatorily motivated and applied is not" a neutral rule. *Id.* at 1294.

Here, there was a factual issue regarding NYCHA's motivation for its TSAP rules, and there was evidence (some of it disputed) supporting petitioners' contention that the purge rules – adopted in settlement of racial discrimination lawsuits against NYCHA -- were specifically designed to remove Hasidic Jews from the applicant pool and thereby speed racial desgregation and racial balancing of the housing projects. Because of this, the Free Exercise claim should not have been decided on summary judgment. See, *Axson*, 356 F.3d at 1294 (case remanded for further proceedings on whether requirement was pretextual and discriminatorily applied to religious conduct, and thus was not generally applicable). See also, *Sassower v. Field*, 752 F. Supp. 1182, 1189-90 (S.D.N.Y. 1990) ("The parties bitterly dispute many material facts and the conflicting versions can only be resolved by a jury. Although we believe that the plaintiffs face a formidable task in proving their claims of sex and/or religious discrimination, the nature of the evidence is such that a jury's evaluation is required.")

former over the latter brings unlawful coercion to bear on the employee's choice." *Hobbie*, 480 U.S. at 144.

The same reasoning ought to apply in the public housing context. Here, otherwise eligible applicants for public housing – a public benefit provided in a "generally applicable" way -- were forced to choose fidelity to their religious practices and affordable housing. The forfeiture of housing benefits for choosing the former over the latter brings unlawful coercion to bear on the applicant's choice, and cannot be justified absent a compelling reason. See also, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) ("As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. Respondent's application of the test of necessity *devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus religious practice is being singled out for discriminatory treatment.*") (Emphasis added.)

Because the Second Circuit's treatment of this case conflicts with this Court's precedent in important ways, *certiorari* should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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* The Clerk of the Court is directed to amend the official caption as set forth above.

No. 09-0553-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2010 U.S. App. LEXIS 1666

January 26, 2010, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from a judgment of the United States District Court for the Southern District of New York. (Robert W. Sweet, Judge).

Ungar v. N.Y. City Hous. Auth., 2009 U.S. Dist. LEXIS 3578 (S.D.N.Y., Jan. 14, 2009)

COUNSEL: For Appellants: MICHAEL H. SUSSMAN, Sussman & Watkins, Goshen, New York.

For Appellee: STEVEN J. RAPPAPORT, of counsel to Sonya M. Kaloyanides, Acting General Counsel, New York City Housing Authority, New York, New York.

JUDGES: Present: AMALYA L. KEARSE, RALPH K. WINTER, ROSEMARY S. POOLER, Circuit Judges.

OPINION

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

Plaintiffs-Appellants ("plaintiffs") appeal from a decision of the United States District Court for the Southern District of New York (Sweet, J.) granting summary judgment for defendant-appellee ("defendant"). Plaintiffs are seventeen orthodox Jews who allege defendant excludes them from public housing in violation of the Fair Housing Act ("FHA"), 42 U.S.C. ß 3601 *et seq.*, and burdens their religious practice in violation of the Free Exercise Clause of the First Amendment by failing to exempt them from its Tenant Selection and Assignment Plan ("TSAP") based on religious hardship.

We review the decision below *de novo,* construing [*2] the evidence in the light most favorable to the non-moving party. *World Trade Center Props., L.L.C. v. Hartford Fire Ins. Co.,* 345 F.3d 154, 165-66 (2d Cir. 2003). We may affirm on any basis supported by the record. *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991); *ACEquip Ltd. v. American Eng'g Corp.,* 315 F.3d 151, 155 (2d Cir. 2003). We assume the

parties' familiarity with the underlying facts and procedural history.

Summary judgment for defendant was appropriate because plaintiffs have not established a prima facie case that TSAP has a disparate impact on Orthodox Jewish families. Title VII disparate impact analysis applies also to claims arising under the FHA. *See Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 934 (2d Cir. 1988). "Under disparate impact analysis ... a prima facie case is established by a showing that the challenged practice of the defendant 'actually or predictably results in . . . discrimination; in other words that it has a discriminatory effect.'" *Id.* (quoting *United States v. City of Black Jack,* 508 F.2d 1179, 1184-85 (8th Cir. 1974)). "If a plaintiff makes a prima facie showing, the burden shifts to the defendant to prove that its actions [*3] furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Tsombanidis v. West Haven Fire Dept.,* 352 F.3d 565, 575 (2d Cir. 2003) (internal quotation marks omitted).

In the present case, there was no evidence that Orthodox Jewish applicants are underrepresented even among new Williamsburg tenants. "The basis for a successful disparate impact claim involves a comparison between two groups--those affected and those unaffected by the facially neutral policy. This comparison must reveal that although neutral, the policy in question imposes a 'significantly adverse or disproportionate impact' on a protected group of individuals." *Tsombanidis,* 352 F.3d at 575. Here, plaintiffs did not compare TSAP's effects on Jewish families with its effects on non-Jewish families. Further, the record contains evidence as to the percentages of Hasidic families that have moved into the Williamsburg developments since 1992. Defendants assert that evidence shows that between 1992 and 2006 approximately 4 percent of the families moving in

were Hasidic, and that between 1998 and 2006 that number was nearly [*4] 5 percent. Plaintiffs, analyzing part of the evidence, assert that only 2.4 percent of the families moving into the Williamsburg developments since 1992 were Hasidic. However, since plaintiffs did not present evidence that Hasidic Jews make up more that 2.4 percent of the applicant pool, the dispute is not material, as plaintiffs have not shown that Hasidic Jews are underrepresented among new tenants in the Williamsburg developments.

Plaintiffs argue that even if 5 percent of new Williamsburg tenants are Hasidic, this represents a "stark decline." However, even if there were evidence of this, NYCHA had previously settled a lawsuit alleging that it had historically discriminated *in favor of* Hasidic families in the Williamsburg developments. *See Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 450 F. Supp. 602 (S.D.N.Y. 1978). Indeed, plaintiffs acknowledge the "historic over-representation of Hasidic in the Williamsburg projects." (Pl.'s Br. at 30). Thus, a stark decline in the percentage of new Hasidic tenants would not necessarily be evidence of discrimination. This is why statistics are important. *Tsombanidis,* 352 F.3d at 575 ("[P]laintiffs are ordinarily required to include [*5] statistical evidence to show disparity in outcome between groups.") (citing *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999)). To know whether TSAP has disparate impact on Hasidic Jews, we would need to know, at a minimum, the percentage of the approximately 80,000 people who apply for public housing each year that is Hasidic. Because plaintiffs have not provided this information, they failed to establish a prima facie case of discrimination.

Nor have plaintiffs established that they are entitled to an exemption from TSAP under the Free Exercise Clause. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes

(or prescribes) conduct that his religious prescribes (or proscribes)." *Employment Division, Dep't of Human Resources v. Smith,* 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (internal quotation marks omitted). A "law that is neutral and of general applicability need not be justified by compelling governmental interests even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

In [*6] the present case, TSAP is facially neutral, making no reference to religious practice. Plaintiffs contend that TSAP is not generally applicable because defendant makes exceptions to its general policy of acting on a first-come, first-served basis for victims of domestic violence, those living in substandard housing, and others, while refusing to accommodate their religious needs. However, defendant grants exceptions only for specified categories, not on an ad hoc basis, and these exceptions are available to Hasidic Jews if they fall into one of those categories. Because TSAP is neutral and generally applicable, defendant need only demonstrate a rational basis for the plan. Defendant's stated reason for TSAP, "assur[ing] that it receives and processes applications for conventional public housing efficiently and in accordance with the laws," is a rational basis for the plan. Because TSAP is neutral, generally applicable, and has a rational basis, plaintiffs failed to establish a Free Exercise violation.

We have considered the plaintiffs' remaining arguments and conclude that they are without merit. The judgment below is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of March, two thousand and ten.

CHAYA AND MICHALE UNGAR, YITTY NIEMAN, FRIEDRICH AND REGINA WEISER, MOSHE DEUTSCH, ISAAC TELLER, SOLOMON WOLLNER, SHEA PINCHUS SCHWARTZ, IRENE ACKERMAN, YEHUDA STEIN, SOLOMON WERZBERGER, JOSHUA ADLER, CHAIM EIDLISZ, AZRIEL KATZ, MOSHE STERN, and ESTHER SCHWARTZ,

Plaintiffs-Appellants,

Docket No. 09-0553-cv

v.

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Appellee.

Chaya and Michael Ungar, Yitty Nieman, Friedrich and Regina Weiser, Moshe Deutsch, Isaac Teller, Solomon Wollner, Shia Pinchus Schwartz, Irene Ackerman, Yehuda Stein, Solomon Werzberger, Joshua Adler, Chaim Eidlisz, Ariel Katz, Moshe Stern, and Esther Schwartz, having filed a petition for panel rehearing, or in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

CHAYA AND MICHAEL UNGAR, YITTY NIEMAN, FRIEDRICH AND REGINA WEISER, MOSHE DEUTSCH, ISAAC TELLER, SOLOMON WOLLNER, SHIA PINCHUS SCHWARTZ, IRENE ACKERMAN, YEHUDA STEIN, SOLOMON WERZBERGER, JOSHUA ADLER, CHAIM EIDLISZ, AZRIEL KATZ, MOSHE STERN, and ESTHER SCHWARTZ, Plaintiffs-Appellants, -v- NEW YORK CITY HOUSING AUTHORITY, Defendant-Appellee.

* The Clerk of the Court is directed to amend the official caption as set forth above.

No. 09-0553-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2010 U.S. App. LEXIS 1666

January 26, 2010, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from a judgment of the United States District Court for the Southern District of New York. (Robert W. Sweet, Judge).

Ungar v. N.Y. City Hous. Auth., 2009 U.S. Dist. LEXIS 3578 (S.D.N.Y., Jan. 14, 2009)

COUNSEL: For Appellants: MICHAEL H. SUSSMAN, Sussman & Watkins, Goshen, New York.

For Appellee: STEVEN J. RAPPAPORT, of counsel to Sonya M. Kaloyanides, Acting General Counsel, New York City Housing Authority, New York, New York.

JUDGES: Present: AMALYA L. KEARSE, RALPH K. WINTER, ROSEMARY S. POOLER, Circuit Judges.

OPINION

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

Plaintiffs-Appellants ("plaintiffs") appeal from a decision of the United States District Court for the Southern District of New York (Sweet, J.) granting summary judgment for defendant-appellee ("defendant"). Plaintiffs are seventeen orthodox Jews who allege defendant excludes them from public housing in violation of the Fair Housing Act ("FHA"), 42 U.S.C. ß 3601 *et seq.*, and burdens their religious practice in violation of the Free Exercise Clause of the First Amendment by failing to exempt them from its Tenant Selection and Assignment Plan ("TSAP") based on religious hardship.

We review the decision below *de novo*, construing [*2] the evidence in the light most favorable to the non-moving party. *World Trade Center Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 165-66 (2d Cir. 2003). We may affirm on any basis supported by the record. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991); *ACEquip Ltd. v. American Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003). We assume the

parties' familiarity with the underlying facts and procedural history.

Summary judgment for defendant was appropriate because plaintiffs have not established a prima facie case that TSAP has a disparate impact on Orthodox Jewish families. Title VII disparate impact analysis applies also to claims arising under the FHA. *See Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 934 (2d Cir. 1988). "Under disparate impact analysis ... a prima facie case is established by a showing that the challenged practice of the defendant 'actually or predictably results in . . . discrimination; in other words that it has a discriminatory effect.'" *Id.* (quoting *United States v. City of Black Jack,* 508 F.2d 1179, 1184-85 (8th Cir. 1974)). "If a plaintiff makes a prima facie showing, the burden shifts to the defendant to prove that its actions [*3] furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Tsombanidis v. West Haven Fire Dept.,* 352 F.3d 565, 575 (2d Cir. 2003) (internal quotation marks omitted).

In the present case, there was no evidence that Orthodox Jewish applicants are underrepresented even among new Williamsburg tenants. "The basis for a successful disparate impact claim involves a comparison between two groups--those affected and those unaffected by the facially neutral policy. This comparison must reveal that although neutral, the policy in question imposes a 'significantly adverse or disproportionate impact' on a protected group of individuals." *Tsombanidis,* 352 F.3d at 575. Here, plaintiffs did not compare TSAP's effects on Jewish families with its effects on non-Jewish families. Further, the record contains evidence as to the percentages of Hasidic families that have moved into the Williamsburg developments since 1992. Defendants assert that evidence shows that between 1992 and 2006 approximately 4 percent of the families moving in

were Hasidic, and that between 1998 and 2006 that number was nearly [*4] 5 percent. Plaintiffs, analyzing part of the evidence, assert that only 2.4 percent of the families moving into the Williamsburg developments since 1992 were Hasidic. However, since plaintiffs did not present evidence that Hasidic Jews make up more that 2.4 percent of the applicant pool, the dispute is not material, as plaintiffs have not shown that Hasidic Jews are underrepresented among new tenants in the Williamsburg developments.

Plaintiffs argue that even if 5 percent of new Williamsburg tenants are Hasidic, this represents a "stark decline." However, even if there were evidence of this, NYCHA had previously settled a lawsuit alleging that it had historically discriminated *in favor of* Hasidic families in the Williamsburg developments. *See Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 450 F. Supp. 602 (S.D.N.Y. 1978). Indeed, plaintiffs acknowledge the "historic over-representation of Hasidic in the Williamsburg projects." (Pl.'s Br. at 30). Thus, a stark decline in the percentage of new Hasidic tenants would not necessarily be evidence of discrimination. This is why statistics are important. *Tsombanidis*, 352 F.3d at 575 ("[P]laintiffs are ordinarily required to include [*5] statistical evidence to show disparity in outcome between groups.") (citing *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999)). To know whether TSAP has disparate impact on Hasidic Jews, we would need to know, at a minimum, the percentage of the approximately 80,000 people who apply for public housing each year that is Hasidic. Because plaintiffs have not provided this information, they failed to establish a prima facie case of discrimination.

Nor have plaintiffs established that they are entitled to an exemption from TSAP under the Free Exercise Clause. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes

(or prescribes) conduct that his religious prescribes (or proscribes)." *Employment Division, Dep't of Human Resources v. Smith,* 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (internal quotation marks omitted). A "law that is neutral and of general applicability need not be justified by compelling governmental interests even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

In [*6] the present case, TSAP is facially neutral, making no reference to religious practice. Plaintiffs contend that TSAP is not generally applicable because defendant makes exceptions to its general policy of acting on a first-come, first-served basis for victims of domestic violence, those living in substandard housing, and others, while refusing to accommodate their religious needs. However, defendant grants exceptions only for specified categories, not on an ad hoc basis, and these exceptions are available to Hasidic Jews if they fall into one of those categories. Because TSAP is neutral and generally applicable, defendant need only demonstrate a rational basis for the plan. Defendant's stated reason for TSAP, "assur[ing] that it receives and processes applications for conventional public housing efficiently and in accordance with the laws," is a rational basis for the plan. Because TSAP is neutral, generally applicable, and has a rational basis, plaintiffs failed to establish a Free Exercise violation.

We have considered the plaintiffs' remaining arguments and conclude that they are without merit. The judgment below is AFFIRMED.

CHAYA AND MICHAEL UNGAR, YITTY NIEMAN, FRIEDRICH AND REGINA WEISER, MOSHE DEUTSCH, ISAAC TELLER, SOLOMON WOLLNER, SHIA PINCHUS SCHWARTZ, IRENE ACKERMAN, YEHUDA STEIN, SOLOMON WERZBERGER, JOSHUA ADLER, CHAIM EIDLISZ, AZRIEL KATZ, MOISHE STERN, ESTHER SCHWARTZ, on their own behalf and on behalf all others similarly situated, Plaintiffs, -against- NEW YORK CITY HOUSING AUTHORITY, Defendant.

06 Civ. 1968

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 3578

January 14, 2009, Decided
January 14, 2009, Filed

SUBSEQUENT HISTORY: Affirmed by Ungar v. N.Y. City Hous. Auth., 2010 U.S. App. LEXIS 1666 (2d Cir. N.Y., Jan. 26, 2010)

COUNSEL: [*1] For Plaintiffs: SUSSMAN & WATKINS, By: Michael H. Sussman, Esq., Goshen, NY.

For Defendant: RICARDO ELIAS MORALES, ESQ., New York City Housing Authority, By: Steven J. Rappaport, Esq., New York, NY.

JUDGES: ROBERT W. SWEET, United States District Judge.

OPINION BY: ROBERT W. SWEET

OPINION

Sweet, D.J.

The plaintiffs, Chaya and Michael Ungar, Yitty Nieman, Friedrich and Regina Weiser, Moshe Deutsch, Isaac Teller, Solomon Wollner, Shia Pinchus Schwartz, Irene Ackerman, Yehuda Stein, Solomon Werzberger, Joshua Adler, Chaim Eidlisz, Azriel Katz, Moishe Stern and Esther Schwartz (the "Plaintiffs") and the defendant New York City Housing Authority (the "Authority" or the "Defendant") have both moved for partial summary judgment under Rule 56 Fed. R. Civ. P.

These dueling motions for summary judgments are another iteration of the competition for public housing in the Williamsburg section of Brooklyn between Hasidic Jews ("Hasidim") on the one hand and principally black and Hispanic applicants on the other. It is that competition which was the subject of the litigations resulting in the consent decrees in Williamsburg Fair Hous. Comm. v. New York City Hous. Auth. and Davis v. New York City Hous. Auth. Here the named Plaintiffs [*2] challenge the operation of the Authority's Tenant Selection and Assignment Plan ("TSAP") as it affects the admission and transfer of Hasidic applicants at three Williamsburg developments: Independence Towers, Taylor-Wythe Houses, and Jonathan Williams Plaza ("the three Williamsburg developments").

Upon the facts and conclusions set forth below, the motion of the Authority is granted, and the motion of the Plaintiffs is denied.

I. PRIOR PROCEEDINGS

A. Prior Proceedings in this Action

Plaintiffs filed their complaint in this action in the Eastern District of New York on or about June 15, 2005, alleging that certain Authority practices prevent Jewish families from obtaining apartments in the three Williamsburg developments.

On December 9, 2005, the Authority moved to change venue to this District. On March 6, 2006, the motion was granted by the Honorable Raymond J. Dearie, and the action was transferred to this Court.

Discovery proceeded. The instant motions were marked fully submitted on June 18, 2008.

B. Prior Related Proceedings

In 1976, the Williamsburg Fair Housing Committee filed a putative class action against the Authority and others, alleging among other things that the Authority had [*3] discriminated against non-white (black and Hispanic) families when renting apartments in the three Williamsburg developments. The United Jewish Organizations of Williamsburg, Inc., representing white families applying for Williamsburg housing, intervened in the suit as a defendant and a third-party plaintiff. The suit was settled by the entry of a consent decree by the Honorable Charles H. Tenney, in May 1978 ("Williamsburg consent decree"). When Judge Tenney died in 1994, the Williamsburg consent decree was transferred to this Court.

Among its injunctive provisions, the Williamsburg consent decree prohibited the Authority from any

preferential treatment based on religion at the three Williamsburg developments.

This Court presided over lengthy and bitter litigation under the Williamsburg consent decree from 1995 to 2005, focusing on the plaintiffs' allegations that the Authority discriminated in favor of Hasidic families in the three Williamsburg developments. The litigation ended in a settlement agreement that terminated the consent decree. See Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., No. 76 Civ. 2125 (RWS), 2005 U.S. Dist. LEXIS 5200, 2005 WL 736146, at *3 (S.D.N.Y. Mar. 31, 2005).

Representatives [*4] of the Hasidic Jewish community in Williamsburg participated in the discussions leading to the settlement agreement, and the United Jewish Organizations of Williamsburg, Inc., not a party in this action, signed the settlement as a party.

In January 1990, The Legal Aid Society filed a class action suit against the Authority, alleging that the Authority had discriminated against black and Hispanic applicants for public housing in its tenant selection and assignment policies, with the result that more than 30 of its developments were disproportionately white.

The Department of Justice ("DOJ") filed a parallel action against the Authority, and the two cases were consolidated as Davis v. New York City Hous. Auth., Nos. 90 Civ. 628, 92 Civ. 4873, 1992 U.S. Dist. LEXIS 19965 (PNL) (S.D.N.Y.).

The Davis plaintiffs objected to the Authority's admissions policies primarily on the grounds that they led to the concentration of racial and ethnic groups into certain developments.

The Davis consent decree was approved by the Honorable Pierre N. Leval in December 1992. See Davis v. New York City Hous. Auth., 90 Civ. 628 (PNL), 1992 U.S. Dist. LEXIS 19965, 1992 WL 420923 (S.D.N.Y. Dec. 30,

1992). When Judge Leval was elevated to the Court of Appeals for the Second [*5] Circuit in 1993, the Davis consent decree was transferred to this Court.

As part of the decree's injunctive relief, the Authority agreed to implement a new TSAP to avoid the concentration of racial and ethnic groups into certain developments. 1992 U.S. Dist. LEXIS 19965, [WL] at *3.

The TSAP limits most applicants to a choice among developments that actually anticipate vacancies within six to nine months, regardless of the applicant's desire to live in a particular neighborhood or a particular development.

Emergency applicants and applicants for transfer to scarce "larger apartments" without such apartments in their development do not select a particular development but select their preferred borough and are placed on a borough-wide list and offered the first appropriate vacancy within their preferred borough. Applicants make either their development choice or their borough choice only after they have been interviewed and found eligible for public housing.

Before the Davis consent decree was approved, the Hasidic community of Williamsburg submitted a comment opposing features of the TSAP that would limit the ability of Hasidic families to choose the three Williamsburg developments. In his decision approving the Davis [*6] consent decree, Judge Leval considered and rejected the objections of the Williamsburg Hasidic community.

In 1996, the Authority sought to amend the TSAP to add a "working family preference," and to change its definition of "smaller apartments" from two bedrooms or fewer, to four bedrooms or fewer. The Legal Aid Society objected to both amendments. In 1997, the second amendment was approved and the working family preference was adopted with one exception. Authority developments that were more than 30 percent white were deemed "segregated," and the Authority

was barred from making any change to the TSAP that would "perpetuate segregation" by slowing the decrease in the number of white families at any of the "segregated" developments. It was also determined that the working family preference would "perpetuate segregation" at the three Williamsburg developments. See Davis v. New York City Hous. Auth., 90 Civ. 628 (RWS), 1997 U.S. Dist. LEXIS 10451, 1997 WL 407250 (S.D.N.Y. July 18, 1997); 1997 U.S. Dist. LEXIS 18111, 1997 WL 711360 (S.D.N.Y. Nov. 13, 1997); 60 F. Supp. 2d 220 (S.D.N.Y. 1999); 103 F. Supp. 2d 228 (S.D.N.Y. 2000); affirmed in part and reversed in part, 278 F.3d 64 (2d Cir. 2002); cert. denied, 536 U.S. 904, 122 S. Ct. 2357, 153 L. Ed. 2d 179 (2002).

The Davis action [*7] was terminated on consent.

II. THE FACTS

The facts have been set forth in the Authority's Rule 56.1 Statement, the Plaintiffs' Response, the Plaintiffs' Rule 56.1 Statement, and the Authority's Response. The facts are undisputed except as noted below.

A. The Parties

Plaintiffs are seventeen Orthodox Jews who reside in the Williamsburg section of Brooklyn. Each has alleged that they reside in Williamsburg because it affords them and their families proximity to the basic necessities of Jewish living, i.e., synagogues, yeshivas, and stores that feature products they need to carry out their religious observance and way of life, and that they cannot live outside of Williamsburg without substantially burdening their religious observance and practice. Plaintiffs claim that since they cannot travel by car or train or bus on the Sabbath, they must reside within walking distance of their synagogues and since their children cannot attend public schools, they must reside within reasonable proximity to the yeshivas available in their communities.

The Authority is a government agency which annually receives substantial financial assistance from the federal government and operates public housing pursuant [*8] to the dictates of the Federal Housing Act of 1937. The Authority operates three large housing developments in the Williamsburg neighborhood: Taylor-Wythe, Independence Towers and Jonathan Williams Plaza.

Arlene Campana ("Campana") administered the Authority's Application and Tenancy Administrative Department from 1998 to April 2008. She previously served as Deputy Director of that department, starting in 1990.

The Authority has 181,000 units and a vacancy rate of 5-6% over the course of a year. It has a waiting list of about 127,000 for public housing and receives 81,000 new applicants each year.

B. The Tenant Selection Process

The TSAP became effective in 1992, replacing a management manual that spelled out the rental process at the development level. The most recent approved iteration of TSAP contains no provision for religious accommodation.

Under the current system for tenant selection and assignment, a prospective tenant is directed to make an in-person application at a Borough Office or to mail an application to a post-office box. Upon receipt of an application, the Borough Office sends it to a central location, where it is reviewed to determine whether the person is income eligible. [*9] Certain information about the applicant is then entered into the computerized preliminary waiting list.

The application asks each applicant to identify two boroughs where he/she would prefer to reside. If an applicant does not indicate any preference, the Authority enters the borough of current residence as the applicant's preference. The Authority enters racial/ethnic information along with

other basic information about each prospective applicant. Each applicant is given a priority from 1-10. The current application has no place where a prospective tenant can indicate a need for housing in a particular part of the city due to religious needs.

After an applicant's information is entered into the computer, he/she must wait until selected for an eligibility interview. A person with a higher priority will likely be interviewed sooner than one with a lower priority, though other factors like borough choice and family size may influence the time between application and interview. When a vacancy comes up, the Authority calls in a number of applicants who requested that borough, need that room size and have priority. At the interview, the Authority confirms the family composition, income, citizenship [*10] and priority.

According to the Plaintiffs, the Authority has a separate process for "borough choice" applicants, who are typically called in due to a housing emergency or their large family size. Large families (those in need of seven rooms or more or five or more bedrooms) are not given the chance to specify developments of choice, merely boroughs. This is denied by the Authority.

According to the Plaintiffs, the Authority tells such families that they will be considered for any vacancy in any borough project suitable for their large family. This is denied by the Authority.

After the paper processing of their applications, applicants with smaller families found eligible after interview are provided lists of the developments available in the boroughs they select in which vacancies are anticipated and make a selection from that list (the "Guide to Anticipated Vacancies"). The list is supposed to be good for a period of six months. The applicant is supposed to choose one development from all those available. Once the applicant

has made that selection, he/she is taken off the waiting lists for all other developments, If an applicant selects a development and then rejects a specific apartment [*11] that becomes available in that development, the application is declared "dead." Likewise, if an applicant called in for an interview does not choose to reside in any of the listed apartment buildings, the application is deemed "dead."

Campana does not keep track of the racial/ethnic composition of the Authority buildings, nor does her department have any responsibility for insuring compliance with racial guidelines in tenanting.

According to the Plaintiffs, decisions as to who will occupy a particular unit are made at the development level; i.e. the specific building must choose from the list of prospective tenants sent by Campana's unit. This is denied by the Authority.

At the building level, decisions as to who will obtain housing are not influenced by race or national origin. Campana's unit does not take race or national origin into account in sending potential applicants to a building.

Transfer from one development to another is only permitted for certain reasons. Among these is the need for child care or health care. Religious accommodation is not a justification for inter-development transfer. Any inter-development transfer must first he approved at the building level.

According to [*12] the Plaintiffs, for large families, only intra-development transfers are permitted. This is denied by the Authority.

According to the Plaintiffs, the Authority allows applicants for housing and for transfer to specify a borough of preference and, for families needing three or fewer bedrooms, to specify the project in which they wish to reside, but does not permit prospective tenants who require

four or more bedrooms to specify housing developments where they either wish or need to live or cannot or do not want to live. This is denied by the Authority.

The Authority policies apply to religious tenants or prospective tenants, and no exception applies for persons with a religious need for accommodation.

According to Campana, a Jewish applicant is not allowed to specify a particular building and stipulate that he/she will remain on the waiting list as long as it takes to get into that building without risk of being dismissed from the waiting list for refusing to live in other areas. In explaining why a Jewish family is not allowed to wait for an opening in a specific building, Campana contended that the Authority had a need for applicants to fill vacancies.

According to the Plaintiffs, in [*13] light of the numerosity of people on the waiting list, this fear is groundless because a Jewish applicant does not "provide a realistic tenant" for buildings outside of Williamsburg. This is denied by the Authority.

C. The Objections to the TSAP

Representatives of the Hasidic community in Williamsburg have made known to the Authority since at least 1992 their objections to the TSAP on the basis that it insufficiently accommodates their religious practices and has the effect of depriving otherwise qualified observant Jews of housing opportunities. In March 1996, counsel for a group of Orthodox Jewish Hasidic families wrote Chairman Ruben Franco complaining that the TSAP violates the constitutional and statutory rights of his clients.

According to the Plaintiffs, Hasidic Jews must live within walking distance of their synagogues. Travel by car, bus or train on Sabbaths and holidays is prohibited, a ritual bath must be within walking distance of the home, and

dietary needs require purchase of kosher foods and other religious supplies within walking distance.

According to the Plaintiffs, Hasidic children are educated in yeshivas located within their neighborhoods, Hasidic families need religiously [*14] and culturally appropriate day-care services, the staff must speak Yiddish, and religious law must be strictly observed.

According to the Plaintiffs, religious obligations to elderly parents require Hasidic Jews to live near their elderly parents, and when a parent reaches the age that he/she needs assistance in carrying out religious duties, at least one child must live nearby to assist.

Under the TSAP, if Hasidic families who apply for large apartments are offered and reject two apartments in the same borough, they are stricken from the list of qualified applicants. The Authority does not recognize that Hasidic families suffer "undue hardship" if they are forced to live outside Williamsburg.

According to Plaintiffs, since 1993 no Orthodox Jewish family has received a public housing unit from the Authority in the Williamsburg projects. This is disputed by the Authority.

D. Applicants for Housing

The first group of Plaintiffs consists of applicants for housing in the three Williamsburg projects.

Yitty Nieman last applied for public housing in 1998, and that application expired in 2000.

Moshe Deutsch ("Deutsch") last applied for public housing in 1999 and his application expired in February [*15] 2002 before he was found eligible. In 2001, Deutsch rented a private apartment through the Authority's Section 8 program.

Deutsch is a Hasidic Jew who is married, has eight children and has lived with his family at 563 Flushing Avenue since January 2005.

According to the Plaintiffs, Deutsch has qualified for public housing and has been seeking public housing since at least November 7, 1991, the date of his initial application on file with the Authority. This is denied by the Authority.

When Deutsch originally applied for public housing, he resided at 309 Hewes Street in Williamsburg. Deutsch reported on his initial application that he was married, had three children and wished to move somewhere else in Williamsburg because "apartment is very small." His application was later updated, listing the additions to his family and the need for additional room. The Authority has never offered Deutsch a public housing unit in Williamsburg.

On March 23, 2001, the Leased Housing Department of the Authority confirmed that the Department of Housing Applications had found Deutsch eligible for the Section 8 Housing Assistance Program and advised him that the Authority was prepared to start the process [*16] "that will entitle you to receive rental assistance under this program." Before sending this letter, the Authority personnel completed a questionnaire assessing the Deutsches' eligibility. In July 2001, the Authority commenced subsidizing rental payments for the Deutsches' apartment through Section 8. The total monthly rent was $ 754, with the Authority paying $ 523.

Effective January 1, 2005, the Deutsch family moved to a five bedroom apartment at 563 Flushing Avenue. The Authority payed a monthly rent subsidy of $ 1,117.00 for this housing and the Deutsches payed $ 533/month. The Deutsches continue to live in this apartment with the Authority paying $ 1,279 per month in rental assistance. In 2005, the family's share of the rent was $ 533 per month or $ 6,396 per year, which was 50% of the family income of $

12,795. As of October 1, 2006, Deutsch signed a two-year lease at a monthly rent of $ 1,818.

According to the Plaintiffs, Deutsch rejected one small apartment offered by the Housing Authority in a neighborhood outside Williamsburg because residing there would have substantially interfered with the practice of his religion. This is denied by the Authority.

Solomon Wollner ("Wollner") [*17] is a Satmar Jew who is married and has eight children, two of whom are married and out of his household. Wollner first applied for public housing before 1987. He last applied for public housing in 1999, and his application expired in May 2002 before he was reached for an eligibility interview.

According to the Plaintiffs, between 1990-1993, the Authority offered Wollner an apartment in the Bedford-Stuyvesant section of Brooklyn, about 25-30 blocks from Williamsburg, and Wollner declined this offer because accepting it would have substantially interfered with his family's practice of their religion. This is denied by the Authority.

According to Plaintiffs, on several occasions after 1993, Wollner went to housing authority offices at Taylor Homes in Williamsburg and the Authority's agents advised him "that they're not accepting applications." Wollner ceased making these efforts in 1999.

According to the Authority's records, Wollner applied for public housing in April 1999 and was purged from the Authority records on May 20, 2002. The reason for the purging was not stated.

According to the Plaintiffs, Wollner is still interested in obtaining appropriate public housing. Irene Ackerman ("Ackerman") [*18] applied for public housing in 2002; her application was deemed "dead" because she failed to appear for an eligibility interview. She applied again in 2004 and

has not been reached for an eligibility interview on her 2004 application.

Yehuda Stein ("Stein") applied for public housing in 2004, and was not reached for an eligibility interview. According to the Plaintiffs, Stein is a 31-year old Hasidic Jew who lives with his wife and four young children in private housing in Williamsburg. Stein and his wife applied for public housing in 1998 and again on March 18, 2004. According to Plaintiffs, starting sometime in 1999 and until 2004-05, Stein resided in a public housing unit at 190 Marcy Avenue in Williamsburg, which unit was rented by another family who lived there with Stein and his wife and children and to whom he paid rent.

According to the Plaintiffs, in August 2002, by letter, the Authority offered Stein a public housing unit in Harlem. This is denied by the Authority. According to the Plaintiffs, Stein did not have any interest in this apartment, explaining that he wanted an apartment in Williamsburg.

Since his application of March 2004, Stein has not been called for an interview.

Moshe [*19] Stern ("Stern") has been placed on the waiting list for an apartment at Tompkins Houses in Brooklyn. Whether he was willing to accept an apartment at that development is disputed.

According to the Plaintiffs, Stern is a Hasidic Jew who lives with his wife and four children in private housing in Williamsburg. In 1999, Stern qualified and applied for a handicapped-accessible public housing unit in Williamsburg that would accommodate the needs of his second child. The Authority offered Stern handicapped accessible housing outside of Williamsburg. According to the Plaintiffs, Stern rejected this offer because accepting it would have substantially interfered with his ability to practice his religion.

E. Tenants Seeking Transfers

The second group of plaintiffs consists of nine families; Chaya and Michael Ungar (a/k/a Mechl Unger), Friedrich and Regina Weiser, Isaac Teller, Shia Pinchus Schwartz, Solomon Werzberger, Joshua Adler, Chaim Eidlisz, Azriel Katz, and Esther Schwartz, who are tenants of the three Williamsburg developments, some of whom are seeking transfers to "large apartments" (defined as five bedrooms or more).

Large families seeking transfers must first go on the waiting list for [*20] a large apartment in their own development if any are available. Large families who have been on the waiting list for a large apartment for two years have the option of going on the borough-wide waiting list. Large families in developments with no large apartments go on a borough-wide waiting list.

Chaya and Mechl Unger do not have a "large family" (needing five bedrooms or more). Pursuant to the Authority's occupancy standards, families needing five bedrooms or more are families of nine or more persons. The Unger family consists of only two people.

Friedrich and Regina Weiser (the "Weisers") are Hasidic Jews who reside on the 15th floor in Williams Plaza, a public housing project in Williamsburg. According to the

Authority's records, the Weisers are also not a "large family." The family never consisted of nine or more persons, and now consists of only five persons.

According to the Plaintiffs, with their five children, the Weisers have resided in a two bedroom apartment on the 15th floor of a public housing building since 1985. This is denied by the Authority.

According to the Plaintiffs, on January 1, 1987, the Weisers sought an intra-project transfer because of Weiser's

heart condition [*21] and overcrowded conditions and on December 29, 1989, made another request for transfer, supported by a note from Dr. Leonard Steinfeld of the Mt. Sinai School of Medicine who noted that Mr. Weiser had moderately severe heart disease and that he had advised Weiser to "refrain from climbing stairs to preserve his current, but impaired, state of cardiac function."

On February 20, 1990, the Manager of Williams Plaza, Asaro ("Asaro"), noted that "tenant requires a 5 room apartment due to overcrowding, There are very few 5 room vacancies at Williams Plaza. Also tenant requires a transfer to a lower floor due to severe Aortic Regurgitation and Wolf Parkinson White Syndrome. Doctor's letter on file." Two days later, Asaro received a note from the Management Department of the Brooklyn West District which stated, "no chance of 5 rooms in Indep or Taylor-Wythe." On July 2, 1990, Dr. Steinfeld submitted a letter which indicated that Weiser required "surgical replacement of his aortic valve." The doctor strongly recommended against Weiser's climbing stairs. The record shows no action taken to deal with this medical situation.

According to the Plaintiffs, in April 2003, management advised Weiser that [*22] a decision was made not to transfer him. This is denied by the Authority.

The Authority's records show that Weiser submitted "updated medical record on his request to be moved to a lower floor" in June, 1993. On November 18, 1993, Weiser's physician advised that he had now had cardiac surgery and was

> markedly limited in his exercise capacity and therefore requires special consideration regarding his living conditions. He certainly cannot climb more than two flights of steps. He has been advised to either live on the first or

> second floor of any walk-up building, or he must reside in an elevator building. Because of his religious convictions he cannot and will not climb steps on the Sabbath which confines him to his apartment on that day each week.

The Authority's records show further conversation between its managers concerning the Weiser transfer request on May 24, 1994, and reflect no further mention of the transfer issue until February 6, 1998, when a transfer was denied.

In June 2004, Weiser again requested an intra development transfer. The request reads, "Friedrich Weiser is disabled with a heart condition. It is dangerous to his health [to] climb stairs, especially so many floors. [*23] Family is severely overcrowded." At the time, the family of six continued to live in a two bedroom apartment. According to the Authority's records, the request for intra-development transfer was entered in TSAP on June 22, 2004, after being approved by a manager.

According to the Plaintiffs, since June 22, 2004, at least 18 apartments of 3 bedrooms or more have been filled at considerably lower floors at Williams, by a preponderance of Hispanic families, though the column showing race/ethnicity is not completed in the Authority's management turnover log. This is denied by the Authority.

Plaintiff Isaac Teller ("Teller") is a Hasidic Jew who is married and has eight children. Since 1988, with his family, Teller has resided in Unit 9B of the Taylor-Wythe Homes, 70 Clymer Street, a public housing development in Williamsburg.

According to the Plaintiffs, on several occasions Mrs. Teller sought a transfer to a larger housing unit by going to the management office at Taylor-Wythe and making a request, but never received an application to fill out.

According to the Plaintiffs, the Authority's agent did contact Mrs. Teller and inquire whether she would accept a five bedroom apartment in Manhattan. [*24] This is denied by the Authority.

According to the Plaintiffs, Mrs. Teller rejected this possibility because accepting it would have substantially interfered with her family's practice of their religion and Teller has never been offered any other transfer.

Plaintiff Shia Pinchus Schwartz ("Schwartz") is a Hasidic Jew who resides in a three bedroom public housing unit in Independence Tower at 125 Taylor Street in Williamsburg, is married and has eleven children, nine of whom live with him and his wife in this apartment.

According to the Plaintiffs, Schwartz has applied for a transfer to a larger apartment but Defendant never offered him one. This is denied by the Authority. The Authority's file shows no such application and there is no note of any such inquiry.

According to the Authority's records, the Schwartz family has not submitted a written transfer request, and consequently was never placed on any transfer waiting list. According to the Plaintiffs, an application was made but the file contains no evidence of it.

According to the Authority's records, Solomon Werzberger does not have a "large family." The family never consisted of nine or more persons. Furthermore, they are no longer [*25] the Authority's tenants. In 2006, they rented a private apartment through the Authority's Section 8 program.

Plaintiff Chaim Eidlisz ("Eidlisz") is a Hasidic Jew who has lived in a public housing unit in Williamsburg for twenty years. Currently, Eidlisz lives with his wife and twelve children in a three bedroom apartment.

According to the Plaintiffs, despite applications, the Authority has never offered Edilisz and his family a larger apartment in Williamsburg, although Eidlisz did reject the Authority's offer of a slightly larger apartment in the Greenpoint section of Brooklyn because moving to that neighborhood would have substantially interfered with the practice of his family's religion. This is denied by the Authority.

According to the Authority's records, the Eidlisz family has not submitted a written transfer request, and consequently was never placed on any transfer waiting list. The Authority's file contains no application for transfer to a larger unit after 1988.

According to the Authority's records, the Azriel Katz family is not a "large family." The family never consisted of nine or more persons. They are no longer the Authority's tenants and in 2005 they rented a private apartment [*26] through the Authority's Section 8 program.

According to the Authority's records, Esther Schwartz lived alone after the death of her husband in 2003. Ms. Schwartz herself has now passed away.

The waiting times for "large apartments" in Williamsburg are not appreciably different at the three Williamsburg developments. While the Authority does not keep data on its tenants' religions, the names on the waiting lists indicate that all the families on those lists are Hasidic Jewish families currently living in the three developments. Hasidic Jewish families are competing with each other for these few apartments.

Large apartments in the three Williamsburg developments, defined as 7 or 8 rooms, are occupied almost entirely ay other Jewish families.

In the 16 years since the TSAP was implemented, there have been only two vacancies in the 56 "large apartments" in

the three Williamsburg developments. Of those 56 "large apartments," 53 are currently occupied by Jewish families. When each of the two vacancies occurred, both apartments went to Hasidic Jewish families living in the developments.

The three Williamsburg developments are all more than 30 percent white.

III. THE SUMMARY JUDGMENT STANDARD

Summary [*27] judgment is granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); SCS Communs., Inc. v. Herrick Co., 360 F.3d 329, 338 (2d Cir. 2004). The courts do not try issues of fact on a motion for summary judgment, but, rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish [its] right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). Summary judgment is appropriate where the moving party has shown that "little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant [*28] of summary judgment is proper." Gallo v. Prudential Resid. Servs., L.P., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all

reasonable inferences against the moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002). However, "the non-moving party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (quotation omitted).

IV. THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS DENIED

The Plaintiffs seek summary judgment on their claim under the Religious Freedom Restoration Act, 42 U.S.C. ß 2000bb- 1 et seq. ("RFRA"). Plaintiffs contend that the Authority's admission and transfer policies function in such a way that Hasidic applicants are sometimes only offered public housing outside of Williamsburg, in neighborhoods in which they cannot live on account of their religious beliefs and practices. If [*29] an applicant rejects two such apartments, he/she is removed from the Authority's waiting list. Plaintiffs argue that the policies thus discriminate against Hasidic applicants, burdening their religion in violation of RFRA. [1] Plaintiffs seek an order granting Plaintiffs an accommodation that allows Hasidic applicants to indicate a preference for the three Williamsburg developments at some point in the application process, and maintain them on the waiting list for those developments until an apartment in one of the three developments becomes available.

1 From the complaint's allegations regarding Plaintiffs Ungar and Weiser, it appears that Plaintiffs also sought to challenge the Authority's policy on transfer for medical reasons. However, both parties

> have ignored this policy on the current motion. Plaintiffs' claims with regard to that policy are therefore considered waived.

The Authority argues that because it is a state entity, RFRA does not apply.

In Employment Div., Dept of Human Res. of Or. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), the Supreme Court held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by [*30] a compelling governmental interest". Id. at 886 n.3. The Court reiterated this principle in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

In 1993, Congress responded to the Smith decision by passing RFRA. The text of 42 U.S.C. ß2000bb-1 is the same today as when it was passed:

> ß 2000bb-1. Free exercise of religion protected
>
> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

> (c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of [*31] standing under article III of the Constitution.

As originally passed, RFRA defined "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State". 42 U.S.C. ß 2000bb-2 (1993). The original act also provided that it applied "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 15, 1993." 42 U.S.C. ß 2000bb-3(a) (1993).

In City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the Supreme Court held RFRA unconstitutional as applied to states and overturn the Smith decision, Congress was not "enforcing" the provisions of the Fourteenth Amendment, but attempting to determine what constitutes a constitutional violation. Id. at 519, 532. The Supreme Court noted that "[p]reventive measures prohibiting certain kinds of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." Id. at 532. However, "RFRA's legislative record lacks examples of modern instances of generally applicable [*32] laws passed because of religious bigotry," id. at 530, and was therefore beyond the scope of Congress' authority under the Fourteenth Amendment.

In 2000, Congress responded to the Boerne decision by amending RFRA to remove all references to states and their subdivisions. Thus, whereas the definition of "government" originally included "a State, or a subdivision of a State", the new version substituted the term "covered entity" which is defined as the District of Columbia, Puerto Rico, and United States territories and possessions. See 42 U.S.C. ß 2000bb-2 (2000). Similarly, whereas 42 U.S.C. ß 2000b-b-3 originally declared that RFRA "applied to all Federal and State law, and the implementation of that law," it now limits its application to Federal law and its implementation.

The Plaintiffs maintain that RFRA nevertheless applies to the Authority because the Authority receives substantial capital and operating funds from the United States. The Plaintiffs argue that the Authority is therefore "an instrumentality of the federal government," and that there is a "Spending Clause nexus" between the Authority and the federal government. Pl. Reply 9. The Plaintiffs have offered no authority [*33] for the novel proposition that through receipt of federal funding, a state agency becomes an "instrumentality of the federal government." In any event, an interpretation of RFRA that permits this kind of back-door application to the states runs afoul of Boerne.

In seeking to apply RFRA to the states, Congress relied on its power, provided by section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." As described above, Boerne held that RFRA did not "enforce" the provisions of the Fourteenth Amendment, but attempted to determine what constitutes a constitutional violation, and was therefore unconstitutional as applied to the states. 521 U.S. at 519, 532. In 2000, Congress amended RFRA to remove all references to state and local governments. Whether Congress would have authority under the Spending Clause to regulate the Authority is not at issue. Because the Authority is an agency

of the City of New York, and RFRA applies only to the federal government, the Plaintiffs' motion for summary judgment on its RFRA claim must be denied.

V. THE AUTHORITY'S MOTION FOR SUMMARY JUDGMENT IS GRANTED

In addition to their RFRA claim, the Plaintiffs [*34] have asserted violations of the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. ß 3601 et seq. (the "FHA"), the First Amendment as applied to the states through the Fourteenth Amendment, and Section 296 of the Executive Law of the State of New York. The Authority seeks summary judgment dismissing the RFRA, FHA and First Amendment claims on the basis of the inapplicability of RFRA, the applicable statutes of limitations, failure to establish discrimination and a burden on the Plaintiffs' exercise of religion, and the compelling reasons for the Authority to comply with the TSAP. As discussed above, the Authority is an agency of the City of New York, and therefore is not amenable to suit under RFRA. That RFRA claim is therefore dismissed. For the reasons stated below, the Plaintiffs' FHA and First Amendment claims must be dismissed as well.

A. Summary Judgment is Granted on the FHA Claim

1. Defendant Has Not Established a Statute of Limitations Defense

First, the Authority asserts that Plaintiffs' FHA claim must be dismissed because Plaintiffs fail to allege that the challenged policies denied them housing within the applicable limitations period. [*35] The statute of limitations applicable to actions brought under the FHA is two years, running from the occurrence or termination of an alleged discriminatory housing practice. See 42 U.S.C. ß 3613(a)(1)(A).

Under federal law, a claim generally accrues once the "plaintiff knows or has reason to know of the injury which is the basis of his action." Singleton v. New York, 632 F.2d 185, 191 (2d Cir. 1980), cert. denied, 450 U.S. 920, 101 S. Ct. 1368, 67 L. Ed. 2d 347 (1981) (quotation omitted). "When a plaintiff experiences a continuous practice and policy of discrimination, however, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." Cornwell v. Robinson, 23 F.3d 694, 703 (2d Cir. 1994) (quotations omitted). "While discrete incidents of discrimination that are not related to discriminatory policies or mechanisms may not amount to a continuing violation, a continuing violation may be found where there is proof of specific ongoing discriminatory polices or practices . . . ." Id. at 704 (citation omitted). The Supreme Court has held that the "continuing violation" doctrine applies to the FHA. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).

The [*36] Authority does not dispute the applicability of the continuing violation doctrine, but asserts that Plaintiffs have adduced no evidence that any of them have been injured by the challenged policies on or after June 15, 2003. However, Plaintiffs need not make such a showing to survive the instant motion. Rather, the burden is on the Authority to demonstrate that none of the Plaintiffs have been injured by the challenged practices during the relevant time period. The statute of limitations is an affirmative defense as to which the defendant has the burden of proof. See Novella v. Westchester County, 443 F. Supp. 2d 540, 545 (S.D.N.Y. 2006). On the record before the Court, it is not clear when Plaintiff Stern was required to select from the list of developments in the Guide to Anticipated Vacancies. Similarly, there is no evidence with regard to the time period during which Plaintiff Adler "has sought transfer to a larger apartment without success," when "[the Authority] Placed

Adler on a waiting list," Complaint 9191 46-47. The parties dispute whether Plaintiffs Teller and Eidlitz were offered, and rejected, apartments outside Williamsburg, and it is not clear from the record before [*37] the Court when these alleged offers were made. Questions of fact therefore remain as to whether Plaintiffs Stern, Adler, Teller and Eidlitz's alleged injuries occurred during the relevant period. [2]

> 2 The Authority has asserted the statute of limitations as a defense to Plaintiffs' constitutional claim as well. The statute of limitations applicable to ß 1983 actions in New York is three years. Owens v. Okure, 488 U.S. 235, 251, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). The Authority's motion for summary judgment on statute of limitations grounds fails as to the constitutional claim on the basis of the same factual disputes.

2. Defendant Is Entitled to Summary Judgment on the FHA Claim

The FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. ß 3604(a). "An FHA violation may be established on the theory of disparate impact or one of disparate treatment." LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995). The Plaintiffs contend that the Authority's failure to provide applicants [*38] for public housing with the option to designate the three Williamsburg projects has a disparate impact on the Hasidic community. Pl. Reply 4.

"A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group."

Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir. 1988). "Under disparate impact analysis . . . a prima facie case is established by a showing that the challenged practice of the defendant 'actually or predictably results in. . . discrimination; in other words that it has a discriminatory effect.'" Id. at 934 (quoting United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974)); see also Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 575 (2d Cir. 2003). "A plaintiff has not met its burden if it merely raises an inference of discriminatory impact. Furthermore, the plaintiff must show a causal connection between the facially neutral policy and the alleged discriminatory effect." Id. (citation omitted). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to "prove that its actions furthered, in theory [*39] and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." Id. at 936.

Plaintiffs' only factual submissions in support of their disparate impact claim are two sworn submissions from concerned citizen Sol Lieser, who resides in Independence Towers. Lieser's submissions rely on his personal knowledge and his "study of the issues involved." Lieser Aff. P 1. Lieser asserts that "very few" Hasidim have lately moved into the three Williamsburg developments. Id. P 9. Lieser also asserts that in the last ten years, no new Hasidic family has received housing in Independence Towers, and that based on his count, the percentage of "white" tenants is less than 300. Lieser Reply Aff. P 3. He estimates that the same is true of the other Williamsburg developments. Id.

Lieser's impressions are contradicted by the Authority's records. As discussed below, the percentage of Hasidic tenants in each of the Williamsburg developments is significantly greater than 300. Further, the turnover logs for the Williamsburg developments indicate that since 1998,

four new Jewish families have rented apartments at Independence Towers, [*40] three new Jewish families have rented apartments at Taylor-Wythe Houses, and ten new Jewish families have rented apartments at Williams Plaza. See Goodman Reply Decl. P 3, Ex. A; Lam Aff., Ex. K.

However, even if Lieser's accounts were accurate, they are not sufficient to demonstrate disparate impact. To prevail on a theory of disparate impact, there must be some evidence that the Authority's policy has resulted or will result in under-representation of Hasidim in public housing. See Hack, 237 F.3d at 91. Statistics is a common tool used to demonstrate such discrimination. "Although there may be cases where statistics are not necessary, there must be some analytical mechanism to determine disproportionate impact." Tsombanidis, 352 F.3d at 576. "whether using statistics or some other analytical method, plaintiffs must also utilize the appropriate comparison groups. They must first identify members of a protected group that are affected by the neutral policy and then identify similarly situated persons who are unaffected by the policy." Id. at 576-77. For example, evidence demonstrating that Hasidim make up a significantly larger percentage of applicants for public housing than residents [*41] would show that Hasidim are under-represented in public housing. There is no such evidence in the record.

In fact, the only statistical evidence in the record demonstrates that Hasidim are significantly over-represented in the three Williamsburg developments. As of 1997, white families constituted only 10% of the Authority's applicant pool. Davis v. New York City Hous. Auth., 90 Civ. 628 (RWS), 1997 U.S. Dist. LEXIS 10451, 1997 WL 407250, at *4 (S.D.N.Y. July 18, 1997). Nonetheless, the Authority's records indicate that white Jewish families constitute approximately half the families at the three Williamsburg developments, and are by far the largest ethnic group in

those developments. The Authority's Resident Data Book, showing "Characteristics of Residents as of June 1, 2005," reports the following racial composition for the three developments: ***[Chart omitted]

Goodman Reply Decl. P 4, Ex. B. Plaintiffs admit that virtually all the white families at the three Williamsburg developments are Jewish families. See Pl. Resp. to Def.'s R. 56.1 Statement P 3.

The Authority's records also demonstrate [*42] that large apartments in the three developments are currently occupied almost entirely by Jewish families, and that all families on the waiting lists for apartments of seven rooms or more in the three Williamsburg developments are Hasidic families currently living in those developments. This fact alone justifies dismissal of the claims related to the Authority's transfer policy for large families.

The Court of Appeals has recognized that a disparate impact claim can also be supported by a 'more qualitative comparison." Tsombanidis, 352 F.3d at 577. In Tsombanidis, owners and residents of a group home for recovering alcoholics and drug addicts brought an FHA claim against the city of West Haven and its fire district, claiming, inter alia, that the fire district's fire code regulations applying to homes with six or more unrelated individuals discriminated against individuals with disabilities. The Court of Appeals described the necessary "qualitative comparison":

> In such a comparison, plaintiffs would have to show that the average recovering [addict] in West Haven has a greater need--qualitatively--for group living than does the average non-recovering resident of West Haven. This would [*43] likely require some quantification of what each group "needs" from a living arrangement

> standpoint. A court could then conclude that, despite whether the quantitative test is met, there is a qualitatively disproportionate impact on recoverings in West Haven.

Id. Such a qualitative analysis is not appropriate in this case. The "needs" asserted by Plaintiffs are entirely based on the three Williamsburg developments' "proximity to the basic necessities of Jewish living, i.e., synagogues, yeshivas, stores which feature products they need to carry out their religious observance and way of life." Pl. Mem. 1-2. Creating an exception to the Authority's admission and transfer policies based solely on such religious considerations would violate the Establishment Clause of the First Amendment. "(C)onsistent with the general neutrality objective of the Establishment Clause, government action that interacts with religion (1) 'must have a secular . . . purpose,' (2) must have a 'principal or primary effect . . . that neither advances nor inhibits religion,' and (3) 'must not foster an excessive government entanglement with religion.'" Skoros v. City of New York, 437 F.3d 1, 17 (2d Cir. 2006); see [*44] also McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 860, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."). Were this Court to grant Plaintiffs the relief requested on the basis of the proximity of the Williamsburg developments to 'the basic necessities of Jewish living," it would be exercising its authority with the sole and explicit purpose of advancing religion. This is not to say that, had Plaintiffs demonstrated that the challenged policies result in Hasidic applicants being disproportionately denied public housing, the Court would be without the power

to grant relief. However, the fact of Plaintiffs' religiosity, standing alone, cannot be the basis for a greater entitlement to a public benefit. See Otero v. New York City Hous. Auth., 484 F.2d 1122, 1139 (2d Cir. 1973) ("[I]t would be impermissible for the Authority to prefer persons of a particular faith for admission to a housing project in a preferred location if admission would otherwise go to others.").

In [*45] any event, it does not appear that relief sought by Plaintiffs, i.e. an order that Hasidic applicants for housing or a transfer be allowed to specify a preference for the three Williamsburg developments, is available under the FHA. "What [Plaintiffs] are seeking is a religious exception to a neutral rule. . . . Plaintiffs would like us to treat failure to make an accommodation as a form of discrimination." Bloch v. Frischholz, 533 F.3d 562, (7th Cir. 2008). The Seventh Circuit rejected this proposition in Bloch, relying on Smith. The court reasoned that creating a rule that equates failure to accommodate with discrimination would be particularly inappropriate in the context of the FHA, which explicitly provides for accommodation of handicap, but not race, sex or religion. Bloch, 533 F.3d at 565 ("The Fair Housing Act requires accommodation of handicaps but not religious beliefs and practices."); see also Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 88 (2d Cir. 2000) ("[T]he FHA does not require a landlord or seller to provide a reasonable accommodation with respect to an individual applicant's religion."), abrogated on other grounds by Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

The [*46] Authority is entitled to summary judgment on Plaintiffs' FHA claim.

B. Summary Judgment Is Granted on the First Amendment Claim

Plaintiffs have also brought a claim pursuant to 42 U.S.C. ß 1983, asserting that the Authority's admission and transfer policies violate the Free Exercise Clause of the First Amendment. "The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . .'" Church of the Lukumi Babalu Aye, Inc., 506 U.S. at 531 (citation omitted, emphasis in original).

"Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny." Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002). However, consistent with Smith, "[w}here the government seeks to enforce a law that is neutral and of general applicability . . . it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices." Id.; see also Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 531. [*47] "A law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice." Combs v. Homer-Center Sch. Dist.., 540 F.3d 231, 241-42 (3d Cir. 2008) (quoting Blackhawk v. Pa., 381 F.3d 202, 209 (3d Cir. 2004). "A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." Id. at 242 (quoting Blackhawk, 381 F.3d at 209); see also Rector, wardens, & Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990) (holding that New York City Landmarks Law is neutral law of general applicability). "A law failing to satisfy these requirements must be justified by a compelling governmental interest and

must be narrowly tailored to advance that interest." Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 531-32.

Facially, the Authority's admission and transfer policies do not bar any particular religious practice or interfere in any way with the free [*48] exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. Nor have Plaintiffs submitted any evidence that the challenged policies have been selectively applied to Hasidic applicants. Defendant is therefore entitled to summary judgment on Plaintiffs' First Amendment claim. See Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 216 (2d Cir. 1997).

VI. CONCLUSION

For the above stated reasons, the partial motion for summary judgment of the Plaintiffs is denied, the partial motion for summary judgment of the Defendant is granted, and the RFRA, FHA and First Amendment claims are dismissed.

It is so ordered.

New York, N.Y.

January 14, 2009

/s/ Robert W. Sweet

ROBERT W. SWEET

U.S.D.J.

(2)

No. 09-1563

Supreme Court, U.S.
FILED
JUL 26 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHAYA AND MICHAEL UNGAR, YITTY NIEMAN, FRIEDRICH AND REGINA WEISER, MOSHE DEUTSCH, ISAAC TELLER, SOLOMON WOLLNER, SHIA PINCHUS SCHWARTZ, IRENE ACKERMAN, YEHUDA STEIN, SOLOMON WERZBERGER, JOSHUA ADLER, CHAIM EIDLISZ, AZRIEL KATZ, MOISHE STERN, ESTHER SCHWARTZ, on their own behalf and on behalf of all others similarly-situated,

Petitioners,

v.

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Second Circuit's opinion that plaintiffs could not establish a Free Exercise Clause violation because Respondent New York City Housing Authority's (NYCHAs') Tenant Selection and Assignment Plan is neutral, generally applicable, and has a rational basis conflict with prior decisions of this Court in an important way?

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Cited Authorities

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Employment Div., Dept of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990) 18, 20

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Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) 21

Cited Authorities

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Sherbert v. Verneer,
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Texas Monthly v. Bullock,
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Thomas v. Review Bd. Of Indiana Employment Security Div.,
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Widmar v. Vincent,
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Williamsburg Fair Housing Committee v. NYCHA,
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Zelman v. Simmons-Harris,
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STATEMENT OF THE CASE

As the courts below recognized, this case can best be understood against the backdrop of prior litigation over the tenanting of the developments in question. That litigation includes:

The Williamsburg Case

In 1976, the Williamsburg Fair Housing Committee filed a class action suit against NYCHA and others, alleging among other things that NYCHA had discriminated against non-white (black and Hispanic) families in renting apartments in the three NYCHA developments in Williamsburg, Brooklyn — Independence Towers, Taylor-Wythe Houses and Jonathan Williams Plaza ("the three Williamsburg developments") The United Jewish Organizations of Williamsburg, Inc. ("UJO"), representing white families applying for Williamsburg housing, intervened in the suit as a defendant and a third-party plaintiff. In 1978, the suit was settled by the entry of a consent decree ("*Williamsburg* consent decree") (JA 638, 691-729).[1]

Among its permanent injunctive provisions, the *Williamsburg* consent decree expressly prohibited NYCHA from any preferential treatment based on religion at the three Williamsburg developments (JA 638, 699). In their complaint, Plaintiffs herein explicitly seek preferential treatment at the three Williamsburg developments based on their religion

1. Numerical references preceded by "JA" are to pages of the Joint Appendix.

(JA 51). The *Williamsburg* consent decree was approved by Judge Charles H. Tenney in May 1978 (JA 719). When Judge Tenney died in 1994, the *Williamsburg* consent decree was transferred to Judge Robert W. Sweet.

Judge Sweet presided over lengthy and bitter litigation under the *Williamsburg* consent decree, beginning in 1995 and ending only at the end of 2005. That litigation focused on plaintiffs' allegations that NYCHA discriminated in favor of Hasidic Jewish families in the three Williamsburg developments. The litigation ended in a settlement agreement that terminated the consent decree. *See Williamsburg Fair Housing Committee v. NYCHA*, 2005 U.S. Dist. LEXIS 5200 at 2-7 [S.D.N.Y. Mar. 31, 2005 (RWS)].

Representatives of the Hasidic Jewish community in Williamsburg participated in the discussions leading to the settlement agreement, and the United Jewish Organizations of Williamsburg, Inc. signed the settlement as a party. Indeed, Azriel Katz, one of the plaintiffs herein, attended a final settlement negotiation meeting on February 5, 2002, at the Southern District of New York Courthouse (JA 639).

The Davis Decree

In January 1990, The Legal Aid Society filed a class-action suit against NYCHA, alleging that NYCHA had discriminated against Black and Hispanic applicants for public housing in its tenant selection and assignment policies, with the result that more than 30 of its developments were disproportionately white. The United States Department of Justice filed a parallel

action against NYCHA, and the two cases were consolidated as *Davis v. NYCHA*, 90 Civ. 628, 92 Civ. 4873 (S.D.N.Y. 1992 [PNL]). In 1992, both cases were settled by the entry of a consent decree ("*Davis* consent decree"). The decree "permanently enjoined" NYCHA from discriminating on the bases of race, color, or national origin (JA 649). Although the rest of the decree was to be dissolved eight years and six months after entry, the permanent injunctive provisions were expressly excepted from dissolution (JA 682); *Davis v. NYCHA*, 278 F3d 64, 67 (2d Cir. 2002)*cert denied*, 536 U.S. 904, 153 L. Ed. 2d 179, 122 S. Ct. 2357 (2002). The *Davis* consent decree was approved by Judge Pierre N. Leval in December 1992. *See Davis v. NYCHA*, 1992 U.S. Dist. LEXIS 19965 (S.D.N.Y. Dec. 30, 1992 [PNL]). When Judge Leval was elevated to the Second Circuit in 1993, the *Davis* consent decree was transferred to Judge Sweet (JA 638).

The *Davis* plaintiffs objected to NYCHA's previous admissions policies primarily on the grounds that they led to the concentration of racial and ethnic groups into certain developments. Therefore, as part of the decree's injunctive relief, NYCHA agreed to implement a new Tenant Selection and Assignment Plan ("TSAP") to avoid the concentration of racial and ethnic groups into certain developments. (JA638, 643-44, 649-55). A copy of the current TSAP was produced in the Joint Appendix in the Court of Appeals (JA64-102).

The TSAP

Applicants

Applicants for public housing initially select a first and second borough in which they wish to live but may not request that their application be assigned to a particular development or "project". Each application is dated, time-stamped, and assigned a priority code (JA 65). A computer then selects applicants to be interviewed based on borough of first choice, apartment size required, priority, and date of application (JA 74). Applicants who are interviewed and found eligible then choose either a development or a borough, depending on the type of apartment they need (JA 75-81).

To promote efficient tenanting and to avoid racial and ethnic concentration, the TSAP limits most applicants to a choice among developments that actually anticipate vacancies within six to nine months, regardless of the applicants' desires to live in a particular neighborhood or a particular development. Emergency applicants and applicants for scarce "larger apartments" (defined as five bedrooms or more) may not select a particular development; instead, they select their preferred borough, and are placed on a borough-wide list and offered the first appropriate vacancy within their preferred borough, in order to place them more quickly and efficiently. Applicants make either their development choice or their borough choice only after they have been interviewed and found eligible for public housing. Significantly, and contrary to plaintiffs' allegations, no applicants in any category are permitted to designate developments that do not anticipate vacancies or to designate geographical areas smaller than a borough (JA 65-66, 75-81).

Transfers Due to Crowded Conditions

NYCHA's Tenant Selection and Assignment Plan (JA64-102) provides that tenants who are approved for transfer because their current apartments are "overcrowded" or "extremely overcrowded" according to approved occupancy guidelines "must choose their current project, unless the project contains no apartments of the size required." Those who need apartments of five bedrooms or more, and whose projects contain no apartments of the size required, may choose only the borough in which they wish to live; those who need apartments of four bedrooms or less, and whose projects have no apartments of the size required, may choose any project designated as anticipating vacancies on the Guide to Anticipated Vacancies (JA 87-88, 90).

Other Transfers

NYCHA tenants are permitted to transfer to different apartments for a large variety of reasons (JA 82-91). Because of the nature of some of the reasons, transferees in certain categories are not required to select a development anticipated to have vacancies in the next six to nine months. For example, tenants who must move within six months due to project renovation (JA85) and tenants living in under-occupied apartments (e.g., one person living in a two-bedroom apartment) (JA86) may select any development. Transferees who show that medical care is available only at a specific facility not within 60 minutes travel time from their home or that a relative can provide home health or travel care not available within 60 minutes of travel time from their home are automatically assigned to a development near the facility or relative (JA88-89).

Option to Change Waiting Lists

When a tenant has been on a waiting list for a particular development for more than two years without having been offered an apartment, the tenant may, but is not required to, choose another development (JA 92). In the absence of an emergency, tenants (or applicants) who have chosen a particular development will have their application deemed "dead" if they reject any apartment offer in that development whereas tenants on a borough waiting list may refuse one offer and remain on the list (JA 92-93).

Special Outreach

When particular developments or types of apartments are difficult to rent, NYCHA may send letters to applicants on a preliminary waiting list, or on a development waiting list, advising them of the possibility that they could be reached sooner if they are willing to accept an apartment at that development or of that type. Those applicants who respond positively are processed for that apartment. Those who do not respond positively do not have their position on the preliminary waiting list or the project waiting list affected (JA 97-100, 423-426).

Hasidic Objection to TSAP

Before the *Davis* consent decree was approved, the Hasidic community of Williamsburg submitted a comment opposing features of the TSAP that would limit the ability of Hasidic families to choose the three Williamsburg developments (JA 638, 688-90). In his

decision approving the *Davis* consent decree, Judge Leval explicitly considered and rejected the objections of the Williamsburg Hasidic community (JA 638). *See Davis v. NYCHA*, 1992 U.S. Dist. LEXIS 19965 at 14 (S.D.N.Y. Dec. 30, 1992 [PNL]). Plaintiffs herein once again object to these features of the TSAP, precisely on the grounds that they do not allow Hasidic Jewish families to concentrate themselves in the three Williamsburg developments (JA 23-26, 638).

Subsequent Davis Litigation

In 1996, NYCHA sought to amend the TSAP to add a "working family preference," and to change its definition of "smaller apartments" from two bedrooms or fewer, to four bedrooms or fewer. The Legal Aid Society objected to both amendments. In 1997, Judge Sweet approved the second amendment (JA 638). *See Davis v. NYCHA*, 1997 U.S. Dist. LEXIS 10451 (S.D.N.Y. July 17, 1997).

Judge Sweet also approved the working family preference, but with one exception. He ruled that any NYCHA development that was more than 30 percent white was deemed "segregated." The three Williamsburg developments are all more than 30 percent white. Judge Sweet further ruled that NYCHA could make no change to the TSAP that would "perpetuate segregation" by slowing the decrease in the number of white families at any of the "segregated" developments. Finally, he found that the working family preference would "perpetuate segregation" at the three Williamsburg developments, even though it was agreed by all parties that the difference between the two

versions of the TSAP would only amount to perhaps 0.5 white families per year at each of the three Williamsburg developments. *See Davis v. NYCHA*, 1997 U.S. Dist. LEXIS 10451 (S.D.N.Y. July 17, 1997); 1997 U.S. Dist. LEXIS 18111 (S.D.N.Y. Nov. 13, 1997); 60 F. Supp. 2d 220 (S.D.N.Y. 1999); 103 F. Supp. 2d 228 (S.D.N.Y. 2000); *affirmed in part and reversed in part*, 278 F.3d 64 (2d Cir. 2002); *cert. denied*, 536 U.S. 904 (2002).

Characteristics of Residents at Williamsburg Developments

Jewish families constitute approximately half the families at the three Williamsburg developments, and they are by far the largest racial/ethnic group there (JA 425-94).

In response to this information, plaintiffs submitted an affirmation from one Solomon Lieser, who described himself as a resident of Williamsburg and offered his impression that "very few" Hasidic families have been "given housing" in any Williamsburg development since 1993 and that "during the last ten years, no new Hasidic family has received any housing" (JA 431-34). However, turnover logs show that 24 Jewish families had rented apartments at the three Williamsburg developments between 1998 and 2006 (JA 510-631, 759).

2008 data shows that white, Jewish families still predominate in the three developments. In particular, Mr. Lieser is, unfortunately, incorrect that the percentage of white families in any of the three developments is below 30%, the figure Judge Sweet deemed to be indicative of segregation. In fact, those

figures range from a low of 42.7% in Mr. Lieser's development, Independence Towers, to a high of 52% at Williams Plaza (JA 759, 767-69).

The Plaintiffs

Plaintiffs consist of two groups: applicants for public housing who seek to obtain housing in one of the three Williamsburg developments and current tenants in one of the three developments who need to transfer to another apartment, for reasons unrelated to religion, but want to remain in Williamsburg due to their religious requirements. Most have never been affected by the policies they challenge because they were never certified as eligible for public housing.

Applicants

The first group of plaintiffs — alleged applicants for public housing — consists of six families: Nieman, Deutsch, Wollner, Ackerman, Stein, and Stern. None of them have shown they were affected by the TSAP as alleged. At least four of the six — Deutsch, Wollner, Ackerman, and Stein — had no eligibility interview on their last application. The limited-choice features of the TSAP do not even come into play until after an applicant has been called in for an eligibility interview and has been found eligible for public housing (JA 74-79).

Tenants Seeking Transfers

The second group of plaintiffs — tenants of the three Williamsburg developments seeking transfers to larger apartments — consists of nine families: Chaya and

Michael Ungar (a/k/a Mechl Unger), Friedrich and Regina Weiser, Isaac Teller, Shia Pinchus Schwartz, Solomon Werzberger, Joshua Adler, Chaim Eidlisz, Azriel Katz, and Esther Schwartz. Although all initially alleged they needed "large apartments" of five bedrooms or more that would be subject to the special rule about such apartments, seven were shown not to need such large apartments (JA 440).

Plaintiffs Deutsch, Wollner, Stein, Stern, and Eidlisz all claim to have been "offered" apartments outside of Williamsburg (JA 24-27, 32). However, none of them say that they selected an apartment from the Guide to Anticipated Vacancies. Rather, it appears that the "offers" they refer to were canvases of their interest in hard to tenant apartments as part of a special outreach. Their expression of disinterest in such apartments would have no effect on their position on their respective waiting lists (JA 97-100, 423-426).

Large Apartments in Williamsburg

Plaintiffs seek to be able to remain on the waiting list for large apartments in all three of the Williamsburg developments rather than just their own. However, the waiting times for "large apartments" in Williamsburg are not appreciably different at the three Williamsburg developments (JA 444, 507-09). More broadly, the "large apartments" plaintiffs covet are occupied almost entirely by other Jewish families. Specifically, of 56 such apartments, 53 are occupied by Jewish families (JA 445-46, 452-94, 510-631). Moreover, in the 16 years since the TSAP was implemented, there have been only two vacancies in the 56 "large apartments" in the three

Williamsburg developments. Of the two vacancies which occurred, both went to Hasidic Jewish families living in the developments (JA 448).

In their motion for summary judgment, plaintiffs ignored the ability of tenants to remain on the waiting list for an apartment in their own developments and emphasized in bold face type that "**Large families [in need of seven rooms or more or five or more bedrooms] are not given the chance to specify developments of choice, merely boroughs.**" (JA 17).

Confronted with the facts about large apartments, plaintiffs submitted a Reply Affirmation of concerned neighborhood resident Solomon Lieser accusing NYCHA of mischaracterizing plaintiffs' claim as concerning NYCHA's policy concerning transfers of large families. Those tenants who "merely sought to transfer to a slightly larger apartment" are discriminated against, he now asserted (JA 756). Mr. Lieser did not acknowledge that, like any other tenants with project choice, tenants in overcrowded apartments seeking apartments of less than seven rooms may stay on the waiting list at their own developments until an apartment becomes available or, after two years, may select any development with anticipated vacancies, including the other Williamsburg developments (JA 92).

Procedural History

Plaintiffs filed their complaint in the Eastern District of New York on or about June 15, 2005, alleging that NYCHA policies regarding the admission and transfer of public housing tenants do not adequately

accommodate their religious need to live at one of three NYCHA developments in Williamsburg. Although plaintiffs brought this case as a purported class action, they never moved for class certification. NYCHA moved to transfer venue to the Southern District of New York; the motion was granted by the Honorable Raymond J. Dearie on March 6, 2006 and the case transferred to Judge Sweet.

After a substantial discovery period, plaintiffs and defendant each moved for summary judgment and the motions were fully submitted June 18, 2008.

In their summary judgment motion, plaintiffs argued that NYCHA is required, under the Religious Freedom Restoration Act, 42 U.S.C. 2000b-1 et seq. ("RFRA"), to exempt them from NYCHA tenanting procedures. In its response, NYCHA pointed out that RFRA does not apply to state and local governments, having been amended after the Supreme Court had held application to the states to be unconstitutional, and could not, therefore, apply to NYCHA, a municipal entity created under the laws of New York State.

In response to defendant's motion for summary judgment, plaintiffs argued that NYCHA has violated the Free Exercise Clause of the First Amendment of the United States Constitution as applied to NYCHA by the Fourteenth Amendment; the Equal Protection Clause of the Fourteenth Amendment; and the Fair Housing Act, 42 U.S.C. § 3601 *et. seq.*

The Decision of the District Court

In a decision filed January 14, 2009, the District Court denied plaintiffs' motion and granted defendant's motion (13a-46a).[2] The Court summarized previous litigation regarding the three Williamsburg developments; NYCHA's tenant selection process; plaintiffs' objections to the process; and the facts as to each plaintiff (15a-32a). The Court then denied plaintiffs' motion for summary judgment on the ground that the RFRA did not apply to NYCHA (32a-37a).

The Court next held that defendant had not established a statute of limitations defense because the record was not clear as to when certain alleged actions occurred (SA 85-87).

The Court granted defendant's motion with respect to plaintiffs' Fair Housing Act claim because plaintiffs had not adduced evidence sufficient to demonstrate a discriminatory effect nor shown any connection between NYCHA's facially neutral policies and any such effect (SA 87-95). The Court then granted defendant summary judgment as to plaintiffs' First Amendment claim because the policies in issue "do not bar any particular religious practice or interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion" (SA 95-97).

2. Numerical references preceding "a" are to the appendix to the Petition for a Writ of Certiorari.

Entry of Judgment for Defendant

Plaintiffs filed a notice of appeal on February 10, 2009. Because both parties believed that the Court's January 14 decision effectively resolved all issues in favor of defendant, plaintiffs requested the Court to enter judgment for defendant *nunc pro tunc* to January 14. Judge Sweet so ordered that request on February 25, 2009. Judgment for defendant was entered on April 30, 2009.

The Decision of the Court of Appeals

On January 26, 2010, the Court of Appeals affirmed the judgment (1a-5a). Summary judgment for defendant was appropriate, the Court found, "because plaintiffs have not established a prima facie case that TSAP has a disparate impact on Orthodox Jewish families" (3a). In particular, "there was no evidence that Orthodox Jewish applicants are under-represented even among new Williamsburg tenants" (4a). Finally, the Court held, "Because TSAP is neutral, generally applicable, and has a rational basis, plaintiffs failed to establish a Free Exercise violation" (5a). Plaintiffs then moved for panel rehearing or rehearing *en banc* and the application was denied on March 26, 2010.

REASON FOR DENYING THE PETITION

THE DECISION OF THE COURT OF APPEALS DECISION IS IN ACCORD WITH OPINIONS OF THIS COURT.

Plaintiffs assert that the TSAP generally precludes an eligible applicant from choosing a particular development but creates exceptions for secular reasons. This conflicts with prior decisions of this Court, they continue, in the absence of a compelling purpose for refusing to create such an exception for religious reasons. In making this argument, plaintiffs badly mischaracterize both the facts and the law.

Applicants

All eligible applicants for public housing must, depending on their priority code, either select a development from a Guide listing those expected to have vacancies in the next six to nine months or select a borough (JA65-81). Conversely, no applicants are permitted to select a development not expected to have vacancies in the next six to nine months and no applicants may select a geographic unit smaller than a borough (*id.*). Thus, to the extent the applicant plaintiffs are arguing that they are not being given the benefit of an exception permitted for secular reasons, they are simply factually incorrect.

Transferors

Tenants who need to transfer for certain reasons are permitted to select particular developments or areas in order to effectuate the reason for the transfer. Thus, tenants who are transferring because they need to be

near a particular medical facility are assigned to a development near that facility (JA88). Similarly, tenants who need home health care or child care from a family member who is more than 60 minutes travel time from the family member are assigned to a development near the family member (JA88-89). To do otherwise would not effectuate the purpose of the transfer. As the Court of Appeals recognized, these "exceptions" are equally available to Hasidic Jews as to any other tenant.

All of the plaintiffs who are NYCHA tenants are living in the Williamsburg community they desire to live in. None are seeking to transfer for a religious purpose. Accordingly, to the extent they intend to argue that NYCHA must permit transfers for religious purposes, such argument is inapposite to their situation. Rather, the only reasons for which plaintiffs have sought transfers have been overcrowded conditions and, in one instance, a need to be on a lower floor for medical reasons.

Any tenant who is approved for a transfer because of overcrowded conditions or because of a need to be on a lower floor for medical reasons may stay on the waiting list at the tenant's own development for as long as the tenant wants if there are any apartments meeting the tenant's needs in that development (JA 87-90). Since all of the tenants seeking transfers live in one of the Williamsburg developments, they can not claim that NYCHA policies are depriving them of public housing in Williamsburg. Although these tenants would presumably have a better chance of finding a suitable apartment more quickly if they could designate three

developments rather than one, they are in that respect no different than any other tenant seeking a transfer for similar reasons.

NYCHA has shown that all the families on the waiting lists for apartments of seven rooms or more in the three Williamsburg developments are Hasidic Jewish families currently living in those developments and that those apartments are currently occupied almost entirely by Jewish families (JA 444-447, 453-94, 507-631). Under the circumstances, plaintiffs requiring seven rooms or more can hardly claim to be denied the free exercise of their religion by their inability to list all these developments rather than go on a borough list after two years.

Thus, plaintiffs do not really seek to be allowed to avail themselves of some "exception" granted for secular reasons. Rather, they seek an advantage over those who do not belong to their sect in obtaining the very desirable apartments in Williamsburg. The law does not require that they be granted such an advantage. *Cf., Hack v. President & Fellows of Yale College*, 237 F.3d 81, 88 (2nd Cir. 2000), *cert denied* 534 U.S. 888 (2001), (affirming lower court decision, reported at 16 F. Supp.2d 183, 193 (D. Conn. 1998), ("[T]he FHA does not require a landlord or seller to provide a reasonable accommodation with respect to an individual applicant's religion.")

The Court of Appeals Applied the Correct Standard.

In *Employment Div., Dept of Human Resources of Ore. v. Smith*, 494 U.S. 872, 890 (1990), this Court held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest". The Court reiterated that principle in *Church of the Lukumi Babalu AYE, Inc.* 508 U.S. 520, 532 (1993).

In 1993, Congress attempted to nullify the *Smith* decision by passing the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb 1, ("RFRA"). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court struck down the RFRA as unconstitutional as applied to states and their subdivisions. In 2000, Congress responded to the *Flores* decision by amending RFRA to remove all references to States and their subdivisions. Nevertheless, plaintiffs moved for summary judgment below, citing RFRA. On appeal, plaintiffs conceded that "RFRA does not apply to the state or municipalities" (Appellants' Brief, pp. 33 34) but then immediately ignored that concession by seeking to apply what they aptly characterize as "pre-Smith Free Exercise cases" (Appellants' Brief, p. 34). They simply refused to acknowledge that *Smith* lays out the appropriate standard for analyzing claims against states and municipal entities under the Free Exercise Clause.

In the instant petition, plaintiffs take their refusal to accept the *Smith* standard one step further by seeking to apply the contrary doctrine of *Sherbert v.*

Vernicr, 374 U.S. 398 (1963), decided 27 years previously. In *Sherbert*, the Court held that an unemployment compensation applicant who refused to work on Saturday for religious reasons could not be denied benefits on the ground that she had not shown "good cause" for refusing work. *Sherbert* and the very similar subsequent cases of *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), applied a strict scrutiny test to these types of determinations.

Plaintiffs now argue that *Sherbert*, not *Smith*, applies in cases involving government benefits. One unacknowledged problem with this argument is that *Smith* involved the very government benefit — unemployment compensation — that *Sherbert*, *Thomas*, and *Hobbie* involved. Rather, the *Smith* Court expressly limited *Sherbert* to unemployment compensation cases in which "the eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." 494 U.S. at 884. In other words, the State was precluded from determining that Sherbert's religious belief did not constitute the "good cause" required by the State statute in the absence of a compelling interest. As the Court of Appeals recognized, the NYCHA TSAP challenged herein does not permit such *ad hoc* determinations of "good cause" for seeking to live in particular neighborhoods. Only predefined categories of transferors are permitted to designate neighborhoods, rather than developments or boroughs, to which they wish to transfer.

That *Sherbert* does not govern all government benefits cases is further shown by this Court's handling of *Bowen v. Roy*, 476 U.S. 693 (1986). The majority of the Court in *Roy* held that, regardless of whether it was necessary to effectuate a compelling interest, a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers could be applied to plaintiffs who asserted it would violate their religious beliefs to obtain a Social Security number for their daughter. 476 U.S. at 699-701; *see also Smith*, 494 U.S. at 883. Indeed, far from showing that cases involving government benefits require a stricter level of scrutiny than other types of asserted violations of the Free Exercise Clause, the plurality opinion in *Roy* indicates exactly the opposite:

"Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs." 476 U.S. at 711-12. ". . . denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." 476 U.S. at 701.

Plaintiffs Cannot Show NYCHA Has Any Discriminatory Object.

Since the Supreme Court's *Smith* decision, it has been established "that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has

the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. 520, 531; *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002). "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. The New York Court of Appeals has recognized that "a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment." *Matter of New York State Empl. Relations Bd. V. Christ the King Regional High School*, 90 N.Y.2d 244, 248 (1997).

Neutrality is found lacking only "if the *object of a law*" is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added) (finding that suppression of a religious practice of animal sacrifice "was the object of the ordinances" because the only conduct subject to the ordinance was this religion's sacrifice practice). Plaintiffs herein have not adduced a shred of evidence that the object of the NYCHA procedures they challenge was to restrict their religious practices. Under the circumstances, they can not establish discrimination under the Free Exercise Clause and are not entitled to any change in, or exemption from, NYCHA procedures to accommodate their religious needs.[3]

3. Plaintiffs' inability to show a discriminatory purpose also dooms their claim under the Equal Protection Clause of the Fourteenth Amendment. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

Plaintiffs' Free Exercise of Religion Has Not Been Burdened.

Putting aside the lack of discriminatory intent of the NYCHA policies in question, they simply do not burden plaintiffs' free exercise of religion in any way. NYCHA is not requiring plaintiffs to engage in any act that is contrary to their religion. "The Free Exercise Clause is written in terms of what the government cannot do to the individual not in terms of what the individual can extract from the government." *Bowen v. Roy*, 476 U.S. 693, 700 (1986)(plurality opiion, quoting Douglas, J. concurring in *Sherbert*). NYCHA is doing nothing to plaintiffs other than providing subsidized housing to many of them. They have every right to reject public housing outside of Williamsburg but their exercise of that right does not obligate NYCHA to bend its rules to give them a better chance than others to obtain public housing in Williamsburg.

Further, even if plaintiffs could establish that their exercise of religion is substantially burdened by NYCHA policies, that is insufficient to establish a disparate impact. As the Supreme Court explained in *Flores*, 521 U.S. 507, 535:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

NYCHA Has Compelling Reasons for Not Accommodating Plaintiffs.

Putting aside the lack of any discriminatory intent and the lack of any burden on plaintiffs' religion, the NYCHA policies in question are justified by compelling purposes. Plaintiffs argue that the TSAP was designed, in part, to reduce the numbers of Hasidic Jews in Williamsburg. They fail to apprehend that it is the very lack of consciousness of race and religion in TSAP that is designed to reduce, over time, the disproportionately large number of white tenants, including Hasidic Jews, in the Williamsburg developments. In the *Davis* litigation, Judge Sweet held these developments to be segregated and forbade NYCHA from taking steps to slow down the rate of desegregation. While plaintiffs might not be bound by Court orders in prior litigation, NYCHA is so bound. The policies sought by plaintiffs would, by their design and intent, increase the numbers of Hasidic Jews, and therefore, the numbers of whites, in these developments. The rate of desegregation would slow down and probably be reversed, violating the permanent injunction in the *Davis* decree and reigniting the passions of the 30 year conflict resolved in the *Williamsburg* case. Those policies would be discriminatory; the non-race-conscious TSAP is not.

Allowing Hasidic Jewish applicants to designate the three Williamsburg developments as the developments in which they wish to reside, regardless of anticipated vacancies in those developments and maintaining those applicants on the waiting lists for those developments until they are offered an apartment there, as plaintiffs want, would create what are called "site-based waiting

lists" for the three Williamsburg developments. *See* 42 U.S.C. § 1437d(r), and 24 C.F.R. § 903.7(b)(2). But under plaintiffs' proposal, these site-based waiting lists would be open only to Hasidic Jewish applicants.

This proposal would have the following results: Presumably many Hasidic Jewish families would apply for the three Williamsburg developments. Since NYCHA would then have no need for other applicants to fill the vacancies in those developments, those developments would never appear on the Guide to Anticipated Vacancies (JA 71-73). Therefore, virtually all the families on the waiting lists for these three developments would be Hasidic Jewish families, and in the course of time, the developments would be populated almost entirely by Hasidic Jewish families.

This result would violate 42 U.S.C. § 1437d(r)(1), which requires site-based waiting lists to "comply with all provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.), the Fair Housing Act (42 U.S.C. §§ 3601 et seq.), and other applicable civil rights laws." It would also appear to violate several provisions of 24 C.F.R. § 903.7(b)(2), such as subsection (iv), which requires "reasonable marketing activities to attract applicants regardless of race or ethnicity."

The first sentence of the TSAP articulates its goals: "The New York City Housing Authority has adopted this Tenant Selection & Assignment Plan . . . to assure that it receives and processes applications for conventional public housing *efficiently and in accordance with the laws*" (JA 65) (emphasis added).

The two goals of efficiency and compliance with the law are NYCHA's reasons for avoiding the kind of site-based waiting lists proposed by plaintiffs.

Site-based waiting lists would produce serious inefficiencies in NYCHA's rental process. Applications would pile up in "desirable" developments, while "less-desirable" developments would never have enough applications to fill vacancies. NYCHA would thus have the administrative burden of maintaining useless applications for years and years on the waiting lists of "desirable" developments, while suffering dangerous vacancy loss in the "less-desirable" developments (JA 443).

Site-based waiting lists would also encourage racial and ethnic segregation in NYCHA's developments. For example, NYCHA's developments in Chinatown, so attractive to the Asian community, would become Asian enclaves. And the three Williamsburg developments would become white Jewish enclaves, as explained above (JA 444).

Accommodating Plaintiffs Would Violate the Establishment Clause.

The Establishment Clause of the First Amendment prohibits governments from passing laws which have the "purpose or effect of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-9 (2002). In determining whether government action has the purpose or effect of advancing religion, courts ask whether the government action gives special

treatment to a religious group. *Bd. Of Educ. Of Kiryas Joel v. Grumet*, 512 U.S. 687, 706-707 (1994) (striking down law creating separate school district for Hasidim because the "proposed accommodation singles out a particular religious sect for special treatment, and . . . it is clear that neutrality as among religions must be honored"). Moreover, a policy may not provide benefits to religious groups that are not available to nonreligious groups. *Texas Monthly v. Bullock*, 489 U.S. 1, 11 (1989) (stating that in cases where religious accommodation was deemed constitutional

> we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect).

Courts also determine whether a symbolic link between the government and the religion has been created by the religious accommodation. *Parents' Assoc. of P.S. 16 v. Quinones*, 803 F.2d 1235, 1241 (2d Cir. 1986)(finding that a city plan to educate Hasidic girls separately in a public school to accommodate Hasidims' desire to avoid mixing with non-Jews had the primary effect of advancing religion since the separate treatment of Hasidim created "a symbolic link between the state and the Hasidic sect"); *Bollenbach v. Board of Education*, 659 F. Supp. 1450, 1464 (S.D.N.Y. 1987) (finding that district plan to accommodate Hasidims' religious sensitivities by allowing only male bus drivers to

bus male Hasidic children would have the primary effect of advancing Hasidims' religion by "promoting the Hasidic tenet that boys must not be in contact with women" and thereby creating "a symbolic endorsement by the Court and the District of [the Hasidims'] religious beliefs").

Exempting Hasidim from NYCHA procedures would favor them over other religious groups and non-religious groups and would create a symbolic link between NYCHA and Hasidism. Consequently, it is not permitted under the Establishment Clause.

This Court has recognized that avoiding an Establishment Clause violation "may be characterized as compelling." *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

Thirty eight years ago, in the case most similar to the instant one, former Judge Frankel chastised NYCHA for giving a preference to Jews in certain dwellings because the dwellings were convenient to an old and historic synagogue:

> However laudable their motives, the officials of the City Housing Authority have allowed themselves to employ a criterion of religious selection which the Constitution commands them to eschew. . . The duty of the City Housing Authority is to consider applicants without regard to race, creed, color, or national origin. That duty is violated — and the command of the First Amendment is specifically transgressed — when administrators prefer one applicant over another because of religious faith and convenience of worship.

Otero v. NYCHA, 344 F. Supp. 737 (S.D.N.Y. 1972).

Plaintiffs herein seek to revive the same arguments rejected by this and other Courts for at least 38 years. If, as plaintiffs suggest may occur, other religious groups seek similar treatment, NYCHA developments will become more and more segregated. On the other hand, if no other groups seek similar treatment, a symbolic link between NYCHA and Hasidism is inevitable. There is no way around the fact that exempting Hasidim from NYCHA procedures would favor them over other religious groups and non-religious groups and would create a symbolic link between NYCHA and Hasidism. Consequently, it is not permitted under the Establishment Clause.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

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